No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

CLAYTON BYRD, *ET AL.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

JOINT APPENDIX

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Caption Continued on Inside Cover

PETITION FOR CERTIORARI FILED JULY 20, 2018
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Caption Continued from Front Cover

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Byrd, et al. v. Tennessee Wine and Spirits Retailers Association
No. 17-5552
United States Court of Appeals for the Sixth Circuit

Date Filed	#	Docket Text
05/15/2017	1	Civil Case Docketed. Notice filed by Appellant Tennessee Wine and Spirits Retailers Association. Transcript needed: y. (RB) [Entered: 05/15/2017 09:27 AM]
02/21/2018	54	OPINION and JUDGMENT filed : The district court's judgment declaring § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) in violation of the dormant Commerce Clause is AFFIRMED, and we SEVER those provisions from the Tennessee statute. Decision for publication. Martha Craig Daughtrey, Karen Nelson Moore (AUTHORING), and Jeffrey S. Sutton (CONCURRING IN PART AND DISSENTING IN PART), Circuit Judges. (CL) [Entered: 02/21/2018 11:53 AM]

Date Filed	#	Docket Text
03/15/2018	55	MANDATE ISSUED with no costs taxed. (JC) [Entered: 03/15/2018 10:11 AM]

Byrd, et al. v. Tennessee Wine and Spirits Retailers Association
No. 3:16-cv-02738
United States District Court
for the Middle District of Tennessee

Date Filed	#	Docket Text
10/19/2016	1	NOTICE OF REMOVAL by Tennessee Wine and Spirits Retailers Association from Chancery Court for Davidson County, Tennessee, case number 16-103-II. $400 Filing fee paid—via Credit Card. (Attachments: # 1 Exhibit 1—Complaint and Summons, # 2 Exhibit 2—Chancery Court Pleadings, # 3 Exhibit 3—AG Opinion Nos. 12-59 and 14-83, # 4 Attachment Civil Cover Sheet)(eh) (Entered: 10/19/2016)
1/06/2017	52	MEMORANDUM OPINION OF THE COURT. Signed by Chief Judge Kevin H. Sharp on 1/6/2017. (DOCKET TEXT SUMMARY ONLY—ATTORNEYS MUST OPEN THE PDF AND READ THE ORDER.)(eh) (Entered: 01/06/2017)

Date Filed	#	Docket Text
01/06/2017	53	ORDER: For the reasons explained in the Memorandum filed contemporaneously herewith, the Court rules as follows: 1) Tennessee Wine and Spirits Retailers Association's Motion to Strike (Docket No. 32) is hereby DENIED. 2) Tennessee Wine and Spirits Retailers Association's Motion to Realign Parties (Docket No. 24) is hereby GRANTED. Tennessee Wine and Spirits Retailers Association is the Defendant and Tennessee Fine Wines and Spirits, LLC (d/b/a Total Wine Spirits Beer & More), Affluere Investments, Inc. (d/b/a Kimbrough Fine Wine & Spirits), and Clayton Byrd are the Plaintiffs. 3) Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) and Affluere Investments, Inc.'s (d/b/a Kimbrough Fine Wine & Spirits) Motions to Remand (Docket Nos. 9 , 20) and their requests for attorney's fees are hereby

Date Filed	#	Docket Text
		DENIED. The Court retains jurisdiction over this suit. With these rulings, Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) Motion to Ascertain Status (Docket No. 40) is hereby DENIED AS MOOT. Signed by Chief Judge Kevin H. Sharp on 1/6/2017. (eh) (Entered: 01/06/2017)
01/20/2017	55	MOTION for Partial Summary Judgment by Tennessee Fine Wines and Spirits, LLC. (Attachments: # 1 Exhibit Exhibit 1—Declaration of Edward Cooper, # 2 Attachment Statement of Facts in Support of Motion for Partial Summary Judgment)(Adams, Walter) (Entered: 01/20/2017)
01/30/2017	63	MOTION for Preliminary Injunction by Affluere Investments, Inc.. (Attachments: # 1 Exhibit Exhibit 1—Declaration, # 2 Exhibit Exhibit 2—Affidavit)(Dennen, Keith) (Entered: 01/30/2017)

Date Filed	#	Docket Text
02/10/2017	73	RESPONSE to Motion re 55 MOTION for Partial Summary Judgment filed by Clayton Byrd. (Attachments: # 1 Attachment Plaintiff Clayton Byrd's Response to the Tennessee Fine Wine and Spirits, LLC ("Total Wine")'s Statement of Facts in Support of its Motion for Partial Summary Judgment, # 2 Attachment Affidavit of Clayton Byrd)(Kirklen, Linda) (Entered: 02/10/2017)
03/09/2017	78	COUNTERCLAIM against Clayton Byrd, filed by Affluere Investments, Inc.(eh) (Entered: 03/09/2017)
03/09/2017	80	AMENDED ANSWER to by Tennessee Wine and Spirits Retailers Association. (eh) (Entered: 03/09/2017)
04/06/2017	91	STATEMENT of facts . (Colbert, Richard) (Entered: 04/06/2017)
04/12/2017	96	NOTICE of Filing by Tennessee Fine Wines and Spirits, LLC re 55 MOTION for Partial Summary

Date Filed	#	Docket Text
		Judgment (Attachments: # 1 Exhibit Exhibit 1—Declaration of W. Justin Adams)(Adams, Walter) (Entered: 04/12/2017)
04/14/2017	98	MEMORANDUM OPINION OF THE COURT. Signed by Chief Judge Kevin H. Sharp on 4/14/17. (DOCKET TEXT SUMMARY ONLY—ATTORNEYS MUST OPEN THE PDF AND READ THE ORDER.)(af) (Entered: 04/14/2017)
04/14/2017	99	ORDER: For the reasons set forth in the Memorandum filed contemporaneously herewith, Plaintiff Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) Motion for Partial Summary Judgment, (Docket No. 55), is hereby GRANTED. The Court declares the residency requirements under Tenn. Code Ann. § 57-3-204 unconstitutional and enjoins their enforcement. This order shall constitute the judgment in this case pursuant to Fed. R. Civ. P. 58.

Date Filed	#	Docket Text
		It is SO ORDERED. Signed by Chief Judge Kevin H. Sharp on 4/14/17. (af) (Entered: 04/14/2017)
04/14/2017	101	ORDER: Pending before the Court are the following motions: Plaintiff Affluere Investments, Inc.'s (d/b/a/ Kimbrough Fine Wine & Spirits) ("Affluere") Motion for Preliminary Injunction, (Docket No. 63); Plaintiff Clayton Byrd's ("Byrd") Motion for Protective Order, (Docket No. 81); and Plaintiff Byrd's Motion to Dismiss Plaintiff Affluere's Counterclaim for Injunctive Relief, (Docket No. 87). Because the Court has granted Plaintiff Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) Motion for Partial Summary Judgment, Plaintiff Affluere's Motion for Preliminary Injunction, (Docket No. 63), and Plaintiff Byrd's Motion to Dismiss, (Docket No. 87), are hereby DENIED AS MOOT.

Date Filed	#	Docket Text
		Likewise, the Court hereby DENIES AS MOOT Plaintiff Byrd's Motion for Protective Order, (Docket No. 81). It is SO ORDERED. Signed by Chief Judge Kevin H. Sharp on 4/14/17. (af) (Entered: 04/14/2017)
05/11/2017	102	NOTICE OF APPEAL as to 99 Order Dismissing Case,, by Tennessee Wine and Spirits Retailers Association. Filing fee $ 505, receipt number 0650-2440618. (Colbert, Richard) (Entered: 05/11/2017)

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

FILED
2016 SEP 21 PM 3:19
DAVIDSON CO. CHANCERY COURT
DCRM

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION;	)	
Plaintiff,	)	
v.	)	**No. 16-1031-II**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE & SPIRITS; and TOTAL WINE SPIRITS BEER & MORE,	)	
Defendant.	)	

COMPLAINT FOR DECLARATORY JUDGMENT

INTRODUCTION

This is an action brought by Clayton Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission ("Commission"), by and through his counsel of record, the Attorney General and Reporter of the State of Tennessee, seeking a declaratory order that construes

EXHIBIT
1

the constitutionality of the two-year residency requirement outlined in Tenn. Code Ann. § 57-3-204(b)(2)(A) in order to determine the parties' rights under the statute. Currently, at least two nonresident entities have applied to the Commission for a retail package store license and are awaiting the Commission's decision to either grant or deny their applications.

I. PARTIES

1. Plaintiff Clayton Byrd is the Executive Director of the Tennessee Alcoholic Beverage Commission. Director Byrd is "solely responsible to the commission for the administration and enforcement of this chapter and shall be responsible for the performance of all duties and functions delegated by the commission." Tenn. Code Ann. § 57-1-105. The Commission has a duty to "[i]ssue all licenses in respect to . . . sale, and delivery of alcoholic beverages . . . ." Tenn. Code Ann. § 57-3-104(c)(1).

2. Defendant Tennessee Wine & Spirits Retailers Association ("TWSRA") is a Tennessee nonprofit corporation that "represents more than 600 small business owners across Tennessee," and "was founded to protect the interests of the independent package store owners across Tennessee." Tennessee Wine & Spirits Retailers Association, twsra.com, 8/25/16. Its principal office is located at 331 West College St., Pulaski, TN 38478.

3. Defendant Kimbrough Fine Wine & Spirits ("Kimbrough") is in the process of purchasing an existing store located at 1483 Union Avenue, Memphis, Tennessee 38104, at which it plans to conduct business. Kimbrough recently incorporated in

Tennessee, but its principal office and headquarters are at 3367 S. Skyhawk View Cir., West Valley City, Utah 84128.

4. Defendant Total Wine Spirits Beer & More ("Total Wine") is requesting a retail package store license for a location at 6622 Charlotte Pike, Ste. 104, Nashville, Tennessee 37209. Total Wine is incorporated in Delaware and its corporate headquarters are located at 6600 Rockledge Drive, No. 150, Bethesda, MD 20817.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to Tenn. Code Ann.§ 16-11-101 and § 16-11-102 and the Declaratory Judgment Act, Tenn. Code Ann. §§ 29-14-101, *et seq.*

6. Venue in this Court is proper in Davidson County pursuant to Tenn. Code Ann. § 20-4-104. Defendants are not natural persons. Their applications for retail liquor licenses are currently pending in Davidson County, and Plaintiff's decision to grant or deny the applications will occur in Davidson County. Thus, a substantial amount of the acts or omissions giving rise to this cause of action have accrued here.

III. APPLICABLE LAW

7. Tenn. Code Ann. § 57-3-204(b)(2) provides as follows:

> No retail license under this section may be issued to any individual:
>
> (A) Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the

> commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years...

8. Since its original enactment in 1939, this provision has required either a two-year citizenship or two-year residency requirement for retail license holders. 1939 Tenn. Pub. Acts, ch. 49, §§ 7, 8.

9. In 2014, the General Assembly added an additional section, which explains the purpose of the residency requirement as follows:

> It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in § 57-5-101 (b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Tenn. Code Ann.§ 57-3-204(b)(4).

IV. FACTUAL ALLEGATIONS

10. The Commission has a duty to "[i]ssue all licenses in respect to . . . sale, and delivery of alcoholic beverages . . . ." Tenn. Code Ann.§ 57-3-104(c)(1).

11. Defendant Kimbrough is in the process of purchasing the business located at 1483 Union Avenue, Memphis, Tennessee 38104 from the current owner. The purchase is pending the Commission's approval.

12. Defendant Kimbrough has submitted an application for a retail package store license to the Commission and is awaiting a determination. Defendant Kimbrough does not meet the residency requirements in Tenn. Code Ann. § 57-3-204(b)(2)(A).

13. Defendant Total Wine is planning to open a location in Tennessee and has submitted an application for a retail package store license to the Commission. It is also awaiting a determination. Defendant Total Wine does not satisfy the residency requirements in Tenn. Code Ann. § 57-3-204(b)(2)(A).

14. In reliance on two Tennessee Attorney General's Opinions that specifically address the residency requirement in Tenn. Code Ann. § 57-3-204(b)(2) and finding no other grounds for denying the nonresidents' license applications, the Commission's staff would recommend approval of both nonresidents' license applications but for the conflicting statutory residency requirement. Tenn. Att'y Gen. Ops. 14-83 and 12-59.

15. Both nonresident Defendants' applications were scheduled to be heard at the Commission's August 23, 2016, meeting but a decision on the applications was continued to the September 29, 2016,

meeting so that the Commission could explore the legal ramifications of either granting or denying retail package store licenses to nonresident applicants and consult with counsel, the Tennessee Attorney General, regarding this decision.

16. In anticipation of the Commission's decision whether to grant or deny the nonresident Defendants' applications for retail package store licenses, counsel for TWSRA has contacted Director Byrd.

17. Counsel for TWSRA has advised Director Byrd that if the Commission grants a retail package store license to a nonresident entity, Tennessee residents with retail package store licenses "would immediately file suit . . . asking a court to make a Tennessee Agency follow current Tennessee law passed by the Tennessee Legislature elected by Tennessee citizens." (Attachment "A"—Email from Kurtis J. Winstead to Director Byrd 7/16/16.)

18. Conversely, counsel for both Defendants Kimbrough and Total Wine have suggested to Director Byrd that if the Commission denies their nonresident applications for a retail package store license, they will pursue legal action against the Commission, which would likely involve a constitutional challenge to the residency requirement.

19. The threat of litigation from both resident and nonresident entities upon issuance of either decision, along with the Attorney General's Opinions regarding Tenn. Code Ann. § 57-3-204(b)(2)(A), has created uncertainty in the Commission about the correct application of the residency requirement to nonresident Defendants' applications.

20. A determination of all parties' rights under Tenn. Code Ann. § 57-3-204(b)(2)(A) through this Court's determination of the statute's constitutionality will afford relief to Director Byrd.

V. CAUSE OF ACTION

21. Plaintiff repeats and incorporates by reference all of the above allegations of the Complaint as though fully set forth herein.

22. A controversy exists regarding the constitutionality of the residency requirement contained in Tenn. Code Ann. § 57-3-204(b)(2)(A).

23. Both nonresident Defendants have suggested to Director Byrd that they will pursue legal action against the Commission if their applications are denied.

24. Counsel for the TWSRA has advised Director Byrd that it will pursue litigation against the Commission if the nonresidents' applications are granted.

25. Regardless of whether the Commission grants or denies Defendants' nonresident applications for retail liquor licenses, the State faces imminent litigation with the attendant financial cost and use of State resources.

26. Accordingly, the Commission seeks a declaratory order from the Court regarding the constitutionality of the residency requirement in Tenn. Code Ann. § 57-3-204(b)(2)(A).

27. Such a determination is necessary for the Commission to lawfully fulfill its duties under Tenn. Code Ann. § 57-3-104(c)(1) and correctly determine

whether nonresident Defendants may be issued a retail liquor license.

VI. PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests that this Court enter judgment as follows:

1. Allowing this Complaint to be filed without cost bond as provided in Tenn. Code Ann. § 20-13-101 and issuing and serving process upon Defendants requiring them to appear and to answer this Complaint;

2. Ordering a speedy hearing of this action for declaratory judgment and advancing it on the Court's calendar pursuant to Tenn. R. Civ. P. 57;

3. Issuing a declaratory judgment that that the residency requirement in Tenn. Code Ann. § 57-3-204(b)(2)(A) is either constitutional or unconstitutional; and

4. Awarding Plaintiff such other further relief to which he may be entitled.

Respectfully Submitted,
/s/ Herbert H. Slatery III
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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT
AT NASHVILLE

FILED
2016 OCT 13 AM 11:43
CLERK & MASTER
CHANCERY COURT

CLAYTON BYRD in his official capacity) as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,

Plaintiff

v.

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE & SPIRITS, and TOTAL WINE SPIRITS BEER & MORE,

Defendants.

No. 16-1021-I

ANSWER OF DEFENDANT, AFFLUERE INVESTMENTS, INC. D/B/A KIMBROUGH FINE WINE & SPIRITS

The Defendant, Affluere Investments, Inc., doing business as Kimbrough Fine Wine & Spirits ("Kimbrough"), submits this Answer to the Complaint for Declaratory Judgment filed by the Plaintiff, Clayton Byrd in his official capacity as Executive Director of the Tennessee Alcoholic Beverage

Commission (the "Commission"). For its Answer, Kimbrough states as follows:

Introduction. To the extent that the Introduction of the Complaint requires a response, Kimbrough admits the allegations of the Introduction. Kimbrough affirmatively states that it submitted an application for a retailer's license to the Commission in May of 2016 (the "Application"). At its August 23, 2016 meeting, the Commission deferred consideration of the Application to its September, 27, 2016, meeting. At its September meeting, the Commission deferred consideration of the Application until resolution of this lawsuit.

Prior to filing the Application, Kimbrough entered into a contract to purchase the assets of an existing liquor store located at 1483 Union Avenue, Memphis, Tennessee 38104. The contract is contingent upon the issuance of a retailer's license by the Commission. Pursuant to the terms of the contract, the seller may terminate the contract and retain the earnest money deposit if that retailer's license is not issued on or before November 30, 2017. Consequently, Kimbrough will be damaged if its Application is not considered by the Commission prior to November 30, 2016.

Moreover, Kimbrough satisfies all requirements for issuance of a retailer's license set forth in Tennessee Code Annotated section 57-3-204 except Tennessee Code Annotated section 57-3-204(b)(2)(A) which is unconstitutional. That provision states:

> No retail license under this section may be issued to any individual: who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which

> application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years

Under this law, Kimbrough would need to be a resident for eight (8) years in order to obtain a liquor license for more than two (2) years. As stated by the Attorney General of the State of Tennessee in 2014:

> The residency requirements facially discriminate against nonresidents, and the intent expressed in Tenn. Code Ann. § 57-3-204(b)(4) does not establish a local purpose sufficient to justify the discriminatory licensing provisions.

Tenn. AG Opn. 14-83 (Sept. 12, 2014). Therefore, the Attorney General opined that the residency requirements for a retail liquor license set forth in Tennessee Code Annotated section 57-3-204(b)(2)(A), as amended by 2014 Tenn. Pub. Acts, ch. 554, § 27, violate the Commerce Clause of the United States Constitution. Kimbrough submits that the rationale used by the Tennessee Attorney General is correct, and the statute violates the Commerce Clause of the United States Constitution.

THE PARTIES.

1. Kimbrough admits the allegations of Paragraph 1 of the Complaint.

2. Kimbrough admits the allegations of Paragraph 2 of the Complaint.

3. Kimbrough admits the allegations of the first sentence of Paragraph 3 of the Complaint. Kimbrough denies the allegations of the second sentence of Paragraph 3 of the Complaint. Kimbrough

affirmatively states that its principal offices are located at 7716 Chapel Creek Parkway North, Cordova, Tennessee 38016. Kimbrough further states that all of its shareholders, executive officers and directors are residents of the State of Tennessee and reside at that address.

4. Kimbrough admits the allegations of Paragraph 4 of the Complaint. Kimbrough affirmatively states that Total Wine's correct corporate name is Tennessee Fine Wines & Spirits, LLC.

5. Kimbrough admits the allegations of Paragraph 5 of the Complaint.

6. Kimbrough admits the allegations of Paragraph 6 of the Complaint.

7. Kimbrough admits the allegations of Paragraph 7 of the Complaint. Kimbrough affirmatively states that the correct citation is Tennessee Code Annotated section 57-3-204(b)(2)(A).

8. Kimbrough admits the allegations of Paragraph 8 of the Complaint.

9. Kimbrough denies the allegations of Paragraph 9 of the Complaint. Kimbrough affirmatively states that the provisions of Tennessee Code Annotated section 57-3-204(b)(4) speak for themselves.

10. Kimbrough admits the allegations of Paragraph 10 of the Complaint.

11. Kimbrough admits the allegations of Paragraph 11 of the Complaint.

12. Kimbrough admits the allegations of Paragraph 12 of the Complaint.

13. Upon information and belief, Kimbrough admits the allegations of Paragraph 13 of the Complaint.

14. Kimbrough admits the allegations of Paragraph 14 of the Complaint.

15. Kimbrough admits the allegations of Paragraph 15 of the Complaint.

16. Kimbrough admits the allegations of Paragraph 16 of the Complaint.

17. Kimbrough admits the allegations of Paragraph 17 of the Complaint.

18. Kimbrough admits the allegations of Paragraph 18 of the Complaint.

19. Kimbrough admits the allegations of Paragraph 19 of the Complaint.

20. Kimbrough admits the allegations of Paragraph 20 of the Complaint.

21. To the extent that Paragraph 21 of the Complaint incorporating by reference the allegations of Paragraphs 1 through 20 require a response, Kimbrough incorporates its responses contained in Paragraph 1 through 20 of this Answer.

22. Kimbrough admits the allegations of Paragraph 22 of the Complaint.

23. Kimbrough admits the allegations of Paragraph 23 of the Complaint.

24. Kimbrough admits the allegations of Paragraph 24 of the Complaint.

25. Kimbrough admits the allegations of Paragraph 25 of the Complaint.

26. Kimbrough admits the allegations of Paragraph 26 of the Complaint.

27. Kimbrough admits the allegations of Paragraph 27 of the Complaint.

28. Kimbrough denies any allegations contained in the Complaint that it has not specifically admitted in this Answer.

29. Kimbrough states that Tennessee Code Annotated section 57-3-204(b)(2)(A) violates the Constitution of the United States and specifically the Commerce Clause by virtue of its discrimination against non-residents.

30. To the extent that the Prayers for Relief contained in Paragraphs 1 through 4 require a response, Kimbrough agrees that a hearing should be held as soon as possible and, at that hearing, this Court should declare Tennessee Code Annotated section 57-3-204(b), and specifically the durational residential requirements, unconstitutional.

Dated: October 13, 2016.

RESPECTFULLY SUBMITTED,

By s/Keith C. Dennen

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Attorneys for Defendant, Affluere Investments, Inc. d/b/a Kimbrough Fine Wine & Spirits

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION	**Case No. 3:16-cv-02738**
Plaintiff,	**Judge Sharp**
V.	**Magistrate Judy Frensley**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, *et al.*,	
Defendants.	

MEMORANDUM

Pending before the Court are the following motions: Defendant Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) ("Tennessee Fine Wines") and Defendant Affluere Investments, Inc.'s (d/b/a Kimbrough Fine Wine & Spirits) ("Affluere") Motions to Remand, (Docket Nos. 9, 20), to which Defendant Tennessee Wine and Spirits Retailers Association ("the Association" or "Association") has responded, (Docket No. 23); Defendant Association's Motion to Realign Parties, (Docket No. 24), to which Defendant Tennessee Fine Wines, Defendant Affluere, and Plaintiff Clayton Byrd ("Byrd") have filed Responses in Opposition, (Docket

Nos. 30, 31, 36), and to which Defendant Association has filed replies (Docket No. 39, 42); and Defendant Association's Motion to Strike, (Docket No. 32), to which Defendant Tennessee Fine Wines has filed a Response in Opposition, (Docket No. 35). For the reasons set forth below, Defendant Association's Motion to Strike will be denied; Defendant Association's Motion to Realign Parties will be granted; and Defendant Tennessee Fine Wines' and Defendant Affluere's Motions to Remand and requests for attorney's fees will be denied.

STATEMENT OF THE CASE

Plaintiff Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission ("the Commission"), originally filed this action in the Chancery Court for Davidson County, Tennessee seeking a declaratory judgment regarding the constitutionality of the two-year residency requirement outlined in Tenn. Code Ann. § 57-3-204(b)(2)(A). (Docket No. 1-1). That provision provides as follows:

> No retail license under this section may be issued to any individual: Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years[.]

In addition to himself, Plaintiff Byrd listed the following as parties[1] to the action: "Defendant Tennessee Wine & Spirits Retailers Association," "Defendant Kimbrough Fine Wine & Spirits," and "Defendant Total Wine Spirits Beer & More." (*Id.* at 2, ¶¶ 2-4). In his Complaint, Plaintiff Byrd alleges the following:

The Commission oversees the issuance of alcohol licenses. Both Defendant Kimbrough Fine Wine & Spirits and Defendant Total Wine Spirits Beer & More submitted applications to the Commission for a retail package store license, but neither meets the residency requirement. Relying on two Tennessee Attorney General's Opinions finding the residency requirement unconstitutional and finding no other reason to deny the nonresidents' license application, the Commission otherwise would recommend approving the pending applications. The Commission postponed making a decision on the applications in order to explore the legal consequences of either granting or denying the licenses and to consult with counsel, the Tennessee Attorney General. In anticipation of the decision, counsel for Defendant Tennessee Wine & Spirits Retailers Association contacted Plaintiff Byrd and advised that, "if the Commission grants a retail package store license to a nonresident entity, Tennessee residents with retail package store licenses 'would immediately file suit . . . asking a court to make a Tennessee Agency follow current Tennessee law passed by the Tennessee Legislature elected by

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[1] When the Court describes the allegations in Plaintiff Byrd's Complaint, the Court refers to the parties in the same manner in which Plaintiff Byrd does.

Tennessee citizens.'" (*Id.* at 5, ¶ 17). Counsel for both Defendant Kimbrough Fine Wine & Spirits and Defendant Total Wine Spirits Beer & More "have suggested to Director Byrd that if the Commission denies their nonresident applications for a retail package store license, they will pursue legal action against the Commission, which would likely involve a constitutional challenge to the residency requirement." (*Id.* at 5, ¶ 18). Plaintiff Byrd further asserts that "[t]he threat of litigation from both resident and nonresident entities upon issuance of either decision, along with the Attorney General's Opinions regarding Tenn. Code. Ann. § 57-3-204(b)(2)(A), has created uncertainty in the Commission about the correct application of the residency requirement to nonresident Defendants' applications." (Id. at 5, ¶ 19).

Defendant Association filed a Notice of Removal pursuant to 28 U.S.C. § 1446(b) on October 19, 2016, removing the case to this Court based on this Court's federal question jurisdiction under 28 U.S.C. § 1331. Defendant Tennessee Fine Wines and Defendant Affluere seek to remand the case, arguing that the Notice of Removal is defective because they did not consent or join in.

LAW AND ANALYSIS

I. Motion to Strike

As an initial matter, the Court will address Defendant Association's Motion to Strike. (Docket No. 32). The Federal Rules of Civil Procedure provides a way for courts to strike only documents or portions of documents that are pleadings. *See* Fed. R. Civ. P. 12(f). When deciding whether to strike non-pleading

documents, such as the Responses in Opposition at issue here, trial courts invoke their inherent power to manage their own dockets. *See In re Air Crash Disaster*, 86 F.3d 498, 516 (6th Cir. 1996) (quoting *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817 (3d Cir. 1982)) ("[M]atters of docket control . . . are committed to the sound discretion of the district court."); *Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) (citing *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 586-88 (9th Cir. 2008) and *Hambleton Bros. Lumber Co. v. Balkin Enterprises*, Inc., 397 F.3d 1217, 1224-26 (9th Cir. 2005)) (stating that district courts' inherent power to control their own dockets "includes the power to strike items from the docket as a sanction for litigation conduct."). "However, motions to strike are generally disfavored and should only be granted when the material at issue has 'no possible relation to the controversy.'" *A Metal Source, LLC v. All Metal Sales, Inc.*, No. 1:14-CV-01020-DAP, 2016 WL 245981, at *3 (N.D. Ohio Jan. 21, 2016).

Defendant Association asks this Court to strike Defendant Tennessee Fine Wines' and Defendant Affluere's Responses in Opposition, (Docket Nos. 30, 31), to Defendant Association's Motion to Realign Parties, (Docket No. 24). To support its motion, Defendant Association argues that Defendants Tennessee Fine Wines and Affluere "used their purported responses to the Association's motion to realign the parties as vehicles to reargue their motions to remand without seeking leave of Court to file replies" pursuant to Local Rule 7.01(b). (Docket Nos. 32 at 1; 33 at 2).

Defendant Tennessee Fine Wines opposes the Motion to Strike. It asserts that Defendant Association argues against the Motions to Remand on the grounds that 1) "the parties should be realigned so that the Association is the only defendant[,]" eliminating the need for consent to removal and 2) Defendants Tennessee Fine Wines and Affluere were not "'properly joined and served' before removal." (Docket No. 35 at 1). Because those arguments are "logically related," Defendant Tennessee Fine Wines contends that it was appropriate to address the issue of allegedly not having been "properly joined and served" in its Response in Opposition to Defendant Association's Motion to Realign Parties. (*Id.* at 2).

The undersigned judge has opted out of Local Rule 7.01(b) and "does not require a motion seeking permission to file a reply." Practice and Procedure Manual for Judges and Magistrate Judges for the Middle District of Tennessee (Judge Kevin H. Sharp), § III(C)(3). For that reason alone, Defendant Association's argument in support of its Motion to Strike is unavailing. Furthermore, even though it is true that Defendant Association filed a separate Motion to Realign Parties, it clearly argued in its Response to the Motions to Remand that Defendants Tennessee Fine Wines and Affluere should be realigned as plaintiffs. (Docket No. 23 at 5-6). Given the connection between the Motions to Remand and the Motion to Realign Parties, the Court takes no issue with Defendants Tennessee Fine Wines and Affluere having advanced arguments beyond those strictly related to the Motion to Realign Parties in their Responses in Opposition to it. Therefore, Defendant Association's Motion to Strike will be denied. The

Court will consider arguments raised in the memoranda that Defendant Association sought to strike when ruling on the Motions to Remand and the Motion to Realign Parties.

II. Motions to Remand and Motion to Realign Parties

"The party seeking removal bears the burden of establishing its right thereto. All doubts arising from defective, ambiguous and inartful pleadings should be resolved in favor of the retention of state court jurisdiction. The removal statute is to be strictly construed, with all doubts resolved against removal." *Brown v. New Jersey Mfrs. Ins. Grp.*, 322 F. Supp. 2d 947, 950 (M.D. Tenn. 2004) (internal citations omitted).

A. Properly Joined and Served

Under 28 U.S.C. § 1446(b)(2)(A), "When a civil action is removed solely under section 1441(a)[2], all defendants who have been properly joined and served must join in or consent to the removal of the action." The Sixth Circuit has recognized that "a rule of unanimity . . . has been derived from the statutory language prescribing the procedure for removing a state action to federal court, . . . demand[ing] that all defendants must join in a petition to remove a state case to federal court." *Loftis v. United Parcel Serv.*,

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[2] 28 U.S.C.A. § 1441(a) provides, "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

Inc., 342 F.3d 509, 516 (6th Cir. 2003) (citing *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 n.3 (6th Cir. 1999)). In *Loftis*, the Sixth Circuit wrote, "Consistent with the prevailing view, we hold that all defendants in the action must join in the removal petition or file their consent to removal in writing. . . ." 342 F.3d at 516. "Failure to obtain unanimous consent forecloses the opportunity for removal under Section 1446." *Id.*

Defendant Tennessee Fine Wines argues that it did not join in Defendant Association's Notice of Removal and has not consented and will not consent to removal of the action. Defendant Affluere argues likewise. Therefore, they both contend that Defendant Association's Notice of Removal is defective, requiring the case to be remanded to the Chancery Court for Davidson County. Defendant Association argues, however, that Defendants Tennessee Fine Wines and Affluere were not properly joined and served within the meaning of § 1446(b)(2)(A) and, that being so, their consent was unnecessary.

Defendant Association supports its contention that Defendants Tennessee Fine Wines and Affluere were not properly joined by pointing this Court to the Complaint. In the Complaint, Plaintiff Byrd refers to "Defendant Total Wine Spirits Beer & More" and "Defendant Kimbrough Fine Wine & Spirits." (Docket No. 1-1 at 2, ¶¶ 3-4). According to Defendant Association, those defendants do not exist; they are nothing more than the names under which the corporate entities Tennessee Fine Wines & Spirits, LLC and Affluere Investments, Inc., respectively, propose to do business if the Commission grants them a license. Given that neither Tennessee Fine Wines

and Spirits, LLC nor Affluere Investments, Inc. is a named defendant in the Complaint, Defendant Association argues that they were not properly joined.

Defendant Association supports its contention that Defendants Tennessee Fine Wines and Affluere were not properly served by pointing the Court to the record of the Chancery Court at the time of removal. It relies on *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351 (1999) for the proposition that "the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights." With respect to summons that were issued, Defendant Association argues that the Chancery Court record contained only a copy of a summons issued to "Total Wine Spirits Beer & More" that was directed not to Tennessee Fine Wines & Spirits, LLC's registered agent, but to Attorney Alex Little at a law firm in Nashville. At the time of removal on October 19, 2016, the Chancery Court record contained no filed returns showing service of that or any other summons. Defendant Association essentially argues that Defendants Tennessee Fine Wines and Affluere were not properly served because the Chancery Court record contained neither summons issued to them using their proper legal names nor returns of service. Importantly, it contends that "there is no evidence that . . . the real parties in interest[] were properly served prior to removal of the case on October 19." (Docket No. 23 at 8).

Defendants Tennessee Fine Wines and Affluere assert that they were properly joined and served. Defendant Tennessee Fine Wines cites a case from this Court, *Brown v. New Jersey Mfrs. Ins. Grp.*, 322 F.

Supp. 2d 947 (M.D. Tenn. 2004), to support its argument that it and Defendant Affluere were "properly joined." In that case, this Court held that because the defendant business had notice of the lawsuit despite plaintiff's mistake in suing the wrong, but very closely aligned business, the time to remove the suit began to run from service of the original, misnamed complaint, making defendant's removal untimely. *Brown*, therefore, makes clear that misnaming an entity in a complaint need not be fatal. This Court holds that Defendants Tennessee Fine Wines and Affluere were properly joined despite the references to their "dba" names in the Complaint, especially because Plaintiff Byrd sufficiently identifies Defendants Tennessee Fine Wines and Affluere by stating their respective principal offices.[3]

With respect to being "properly served," Defendant Tennessee Fine Wines argues that it was served prior to the date on which Defendant Association filed its Notice of Removal as evidenced by the information on the return of service, even though the return of service

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[3] In his Complaint, Plaintiff Byrd states that "Kimbrough recently incorporated in Tennessee, but its principal office and headquarters are at 3367 S. Skyhawk View Cir., West Valley City, Utah 84128[,]" and "Total Wine is incorporated in Delaware and its corporate headquarters are located at 6600 Rockledge Drive, No. 150, Bethesda, MD 20817." (Docket No. 1-1 at 2, ¶¶ 3-4). As Defendant Association points out for the Court, "[a]ccording to the Secretary of State, Affluere Investments, Inc., is a Tennessee corporation with its principal office in West Valley City, Utah[,]" and "[a]ccording to the Secretary of State, Tennessee Fine Wines & Spirits, LLC, is a Tennessee corporation with its principal office in Bethesda, MD[.]" (Docket No. 23 at 2-3).

had not yet been filed.[4] Furthermore, Defendant Tennessee Fine Wines correctly points out that the summons is important to directing a party to participate in a civil action only insofar as service of process has not been waived. *See Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351 (1999) ("*Unless a named defendant agrees to waive service*, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.") (emphasis added). As such, Defendant Tennessee Fine Wines argues that because Defendant Affluere filed an answer in the Chancery Court without pleading insufficiency of process or service, Defendant Affluere waived those defenses pursuant to Tenn. R. Civ. P. 12.08 and was deemed served. Defendant Tennessee Fine Wines argues that Defendant Association cites no authority holding that 28 U.S.C. § 1446(b)(2)(A) requires service of process on a party who has answered and waived service. The Court notes that Defendant Affluere argues, on its own behalf, that it was served on September 29, 2016. But whether Defendant Affluere waived service or was served is not important in light of the evidence in the record that Defendant Affluere filed an answer and a

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[4] A return of service was filed in the Chancery Court on October 21, 2016, after removal of the case, indicating that a summons had been sent to Total Wine Spirits Beer & More on October 17, 2016 and the return receipt, signed by one Lisa Vo on October 17, 2016, had been received on October 19, 2016. (Docket No. 14-1 at 1-2). Attorney Alex Little filed a declaration stating that he "accepted . . . service on behalf of Defendant Tennessee Fine Wines & Spirits LLC dba Total Wine Spirits Beer & More the following day, October 18, 2016." (Docket No. 14 at 1, ¶ 3).

motion for judgement on the pleadings in the Chancery Court in response to Plaintiff Byrd's Complaint.

Defendant Association, as "the party seeking removal[,] bears the burden of establishing its right thereto." *Brown*, 322 F. Supp. at 950. Defendant Association implicitly asks this Court to find that it was only required to obtain the consent of other defendants who it knew or should have known had been served by making much of the fact that no returns of service had been filed at the time of removal. However, even by that standard, Defendant Association misses the mark.

The fact that Defendant Association attached the Chancery Court pleadings to its Notice of Removal belies its assertion that "there is no evidence that . . . the real parties in interest[] were properly served prior to removal of the case on October 19." (Docket No. 23 at 8). Given that Defendant Affluere answered the Complaint, Defendant Association knew that Defendant Affluere had been served and that it needed Defendant Affluere's consent to remove. See *Crockett v. Mut. of Omaha Bank*, No. 3:12-CV-00779, 2013 WL 2384344, at *2 (M.D. Tenn. May 30, 2013), *report and recommendation adopted*, No. CIV. 3:12-0779, 2013 WL 3335113 (M.D. Tenn. July 2, 2013) (rejecting defendants' argument that they did not know other defendants had been served when they removed the case because returns of service had not yet been filed, and finding that there were "clear indications" sufficient for defendants to know that the consent of other defendants may have been required to remove the case).

Even if Defendant Association did not know that Defendant Tennessee Fines Wines had been served when in fact it had been, it knew that Defendant Affluere had been served. This Court finds that, under the circumstances, Defendant Association cannot defeat Defendants Tennessee Fine Wines' and Affluere's Motions to Remand by arguing that they had not been properly joined and served.

B. Realigning Parties

"It is [the court's] duty . . . to look beyond the pleadings, and arrange the parties according to their sides in the dispute." *City of Indianapolis v. Chase Nat. Bank of City of N.Y.*, 314 U.S. 63, 69 (1941) (internal quotation marks and citations omitted). "[I]t is the court's responsibility to ensure that the parties are properly aligned according to their interests in the litigation." *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554, 559 (6th Cir. 2010) (citations omitted). "[P]arties [must] be aligned in accordance with the primary dispute in the controversy, even where a different, legitimate dispute between the parties supports the original alignment." *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1089 (6th Cir. 1992) (citations omitted).

Defendant Association argues that this Court should realign Defendants Tennessee Fine Wines and Affluere as plaintiffs, eliminating the need for them to consent to removal. It asserts that the dispute in this action centers around the constitutionality of the residency requirement for obtaining a retail package store license under Tenn. Code Ann. § 57-3-204(b)(2)(A). Defendant Association argues that Plaintiff Byrd, Defendant Tennessee Fine Wines, and

Defendant Affluere all believe a court should find it unconstitutional, whereas it thinks the residency requirement is constitutional.

Defendants Tennessee Fine Wines and Affluere, as nonresidents of Tennessee seeking licenses within the state, undoubtedly would like a court to find the residency requirement unconstitutional. Defendant Association points to a number of factors that indicate that Plaintiff Byrd takes the same position as Defendants Tennessee Fine Wines and Affluere. For example, the Tennessee Attorney General, who represents Plaintiff Byrd, has written two Opinions in which he states that the residency requirement is unconstitutional. (Docket No. 1-3). Furthermore, Plaintiff Byrd states in his Complaint that the Commission would recommend approving Defendants Tennessee Fine Wines' and Affluere's pending license applications in reliance on the Tennessee Attorney General's Opinions. However, Plaintiff Byrd argues that Defendant Association "gives the false impression that only the Association is adverse to Plaintiff when, in fact, all three defendants are adverse to Plaintiff as they have all made threats of litigation regarding Plaintiff's pending decision to grant or deny licenses to the nonresident defendants." (Docket No. 36 at 2).

The Court finds Plaintiff Byrd's argument to be specious. A close reading of the Complaint reveals that the only party that has actually threatened Plaintiff Byrd with suit is Defendant Association. In Plaintiff Byrd's own words, Defendants Tennessee Fine Wines and Affluere "have *suggested* . . . they will pursue legal action against the Commission" if their license applications are denied. (Docket No. 1-1 at 5, ¶ 18) (emphasis added). It is clear from the Complaint

that Plaintiff Byrd does not intend to follow the residency requirement absent a court's determination that it is constitutional. Given the Tennessee Attorney General's involvement in this action, it is equally clear to this Court that the interests of Plaintiff Byrd and Defendants Tennessee Fine Wines and Affluere align.

Nevertheless, Defendants Tennessee Fine Wines and Affluere argue that realignment is unnecessary. They point out, correctly, that cases cited by Defendant Association, such as *City of Indianapolis v. Chase Nat. Bank of City of N.Y.*, 314 U.S. 63 (1941), *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554 (6th Cir. 2010), and *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085 (6th Cir. 1992) all deal with realigning parties when federal jurisdiction is based on diversity. Here, however, the Court has federal question jurisdiction over the suit.

Defendant Tennessee Fine Wines contends that Defendant Association's failure to get its and Defendant Affluere's consent is a procedural, non-jurisdictional defect. *See Loftis*, 342 F.3d at 516 (characterizing the breach of the rule of unanimity as a technical defect in the removal process). It urges this Court to adopt the reasoning in *Energy Partners of Delaware, Ltd. v. Dominion Expl. & Prod., Inc.*, No. CIV.A. 05-6641, 2006 WL 1030391, at *2 (E.D. La. Apr. 18, 2006). In that case, as here, the defendant removed the suit to federal court based on federal question jurisdiction, failed to get his co-defendant's consent, and asked the court to cure that defect by realigning the co-defendant as a plaintiff. *See Energy Partners*, 2006 WL at *1. The *Energy Partners* court

stated that it has a duty to properly align parties when it relates to jurisdiction, but then reasoned that "consent to removal is not a jurisdictional issue: it is a procedural defect that can be cured. Therefore, the Court is under no *duty* to realign the parties to cure [removing defendant's] procedural failure to obtain [co-defendant's] consent." *Id.* at *4.

Defendant Tennessee Fine Wines argues that the *Energy Partners* court's conclusion is consonant with the principle that "[t]he removal statute is to be strictly construed, with all doubts resolved against removal." *See Brown*, 322 F. Supp. 2d at 950 (citing *Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 339 (6th Cir.1989)). It asserts that "[w]here the district court's jurisdiction is not at stake, realigning parties to correct one defendant's procedural failure to comply with the removal statute is not consistent with strictly construing that statute." (Docket No. 30 at 4).

Defendant Association quarrels with the contention that realignment of parties is reserved only to cases involving diversity jurisdiction. It most relevantly cites *Graham v. Tennessee Secondary Sch. Athletic Ass'n*, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995). In that case, removal was premised upon the presence of a federal question and the removing defendant asked the court to realign the nonconsenting defendant as a party plaintiff because the nonconsenting defendant's interest and the plaintiff's interest aligned. The court granted the removing defendant's request, noting its responsibility to align parties according to their interests in the litigation and citing cases such as *City of Indianapolis v. Chase Nat. Bank of City of N.Y.*, 314 U.S. 63 (1941)

and *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085 (6th Cir. 1992). *See* Memorandum and Order at 3-4, *Graham v. Tennessee Secondary Sch. Athletic Ass'n*, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995).

This Court's search has also revealed another case in which removal was based on federal question jurisdiction, but the court realigned parties, preventing the fact that a co-defendant had not joined in the removal petition from defeating removal. *See Still v. DeBuono*, 927 F. Supp. 125, 131 (S.D.N.Y.), *aff'd*, 101 F.3d 888 (2d Cir. 1996) ("Due to the harmony of interests between petitioners and State respondents in this case, the court realigns State respondents as petitioners for purposes of removal. Thus the removal petition was not defective because of State respondents' failure to join in it."). Even in the context of a case that was removed to federal court on the basis of diversity jurisdiction, a court was willing to realign parties not to create diversity jurisdiction, but to remedy the fact that one of the named defendants had not consented to removal. *See Premier Holidays Int'l, Inc. v. Actrade Capital, Inc.*, 105 F. Supp. 2d 1336, 1341 (N.D. Ga. 2000).

Consequently, this Court will grant Defendant Association's Motion to Realign Parties. The *Energy Partners* court simply stated that it was under no duty to realign parties to cure the procedural defect of not obtaining the consent of all defendants. It never said it was forbidden to do so. This Court does not believe that realigning Defendants Tennessee Fine Wines and Affluere as plaintiffs violates the principle that the removal statute should be strictly construed with all doubts resolved against removal. The Court adopts

the reasoning in *Premier Holidays* "that no policy is served by allowing a mislabeled 'defendant' to defeat the true defendants' right to remove the case by withholding its consent." *See* 105 F. Supp. 2d at 1341. The Court agrees that "[t]he joinder requirement is designed only to insure a unanimous choice of a federal forum by the defendants. It cannot reasonably be understood to give a party who in reality occupies a position in conflict with that of other defendants a veto over the removal of the action." *See id.* (citing *First Nat. Bank of Chicago v. Mottola*, 302 F. Supp. 785, 790 (N.D. Ill. 1969), *aff'd sub nom. First Nat. Bank of Chicago v. Ettlinger*, 465 F.2d 343 (7th Cir. 1972)). Given the fact that Defendants Tennessee Fine Wines' and Affluere's interests accord with Plaintiff Byrd's and conflict with Defendant Association's, the Court will realign them.

Anticipating the possibility that this Court would realign the parties, Defendant Tennessee Fine Wines contends that the parties should be realigned such that Defendant Association is the functional plaintiff and Plaintiff Byrd is the functional defendant. Under such a realignment, Defendant Association would have no right to remove the action. *See* 28 U.S.C. § 1441(a). Defendant Tennessee Fine Wines argues that "[u]nder the functional test for party status, courts are not required to look solely to the party which initiates the claim. Rather, a court looks to which party is attempting to achieve a particular result and which party is resisting the other party's claims." *OPNAD Fund, Inc. v. Watson*, 863 F. Supp. 328, 334 (S.D. Miss. 1994) (citing *Mason City & Ft. D.R. Co. v. Boynton*, 204 U.S. 570, 579-80 (1907)). Because Plaintiff Byrd "is seeking a declaratory

judgment as a **defensive** measure against alleged threats of litigation by the Association, Tennessee Fine Wines, and [Affluere][,]" Defendant Tennessee Fine Wines urges the Court to make Plaintiff Byrd the defendant and Defendant Association the plaintiff. (Docket No. 30 at 5). The Court will decline to do so.

The cases that Defendant Tennessee Fine Wines cites, *Gen. Motors Corp. v. Gunn*, 752 F. Supp. 729 (N.D. Miss. 1990) and *In re Gardner*, No. CIV.A.06 9154, 2007 WL 625825 (E.D. La. Feb. 26, 2007), do not support its suggestion for realignment in the context of a declaratory judgment action. In those cases, the court found that the action of one of the parties, namely filing a bill of discovery in state court in *Gunn* and filing a petition to appoint an umpire in state court in *In re Gardner*, was "ancillary to the suit." *In re Gardner*, 2007 WL at *3; *Gunn*, 752 F. Supp. at 732. Thus, the court realigned those parties as the defendant. *Id.*

Those cases are qualitatively different than the case at bar. Plaintiff Byrd filed an action for declaratory judgment in order to determine the rights of all parties, including himself, under Tenn. Code Ann. § 57-3-204(b)(2)(A). His declaratory judgment action is not ancillary to the main suit as described in *Gunn* and *In re Gardner*. Simply put, it is the main suit, and Byrd is the plaintiff.

Given that Defendants Tennessee Fine Wines and Affluere will be realigned as plaintiffs, their consent to removal is not required. For that reason, the Court will deny Defendants Tennessee Fine Wines' and Affluere's Motions to Remand.

C. Attorney's Fees

As part of their Motions to Remand, Defendants Tennessee Fine Wines and Affluere seek awards of attorney's fees. Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Because the Court will deny the Motions to Remand, it will also deny the requests for attorney's fees.

CONCLUSION

For the foregoing reasons, Defendant Association's Motion to Strike, (Docket No. 32), will be denied. Defendant Association's Motion to Realign Parties, (Docket No. 24), will be granted. Defendants Tennessee Fine Wines and Affluere will be realigned as plaintiffs. Defendant Tennessee Fine Wines' and Defendant Affluere's Motions to Remand, (Docket Nos. 9, 20), and their requests for attorney's fees will be denied. Furthermore, Defendant Tennessee Fine Wines' Motion to Ascertain Status, (Docket No. 40), will be denied as moot.

A separate order shall be entered.

s/ Kevin H. Sharp
KEVIN H. SHARP
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CLAYTON BYRD, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, **Plaintiff,** ***vs.*** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION *et al.*** **Defendants**	**Case No. 3:16-cv-02738** **Chief Judge Sharp** **Magistrate Judge Frensley**

TENNESSEE FINE WINES & SPIRITS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More ("Tennessee Fine Wines") hereby moves for partial summary judgment on the complaint of Clayton Byrd declaring the residency requirements for retail package store licenses set forth in Tenn. Code Ann. § 57-3-204(b)(2)(A) and (3)(A) (the "Residency Requirements") unconstitutional under the dormant Commerce Clause and the Privileges and Immunity Clause of the United States Constitution.

In support of this motion, Tennessee Fine Wines relies on the declaration of Edward Cooper (attached

to this motion as **Exhibit 1**), its statement of facts, its supporting memorandum, and the entire record in this case and states:

1. Mr. Byrd, in his capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, initiated this action by filing a complaint seeking a declaratory judgment that the Residency Requirements are "either constitutional or unconstitutional...." (Complaint for Declaratory Judgment, DE #1-1 ["Compl."], at p. 6.)

2. State laws that discriminate against out-of-state economic interests violate the dormant Commerce Clause of the United States Constitution unless they advance a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives. U.S. Const., art. I, § 8, cl. 3; *Department of Revenue v. Davis*, 553 U.S. 328, 338 (2008); *Granholm v. Heald*, 544 U.S. 460, 472 (2005).

3. State laws that discriminate against non-residents doing business in that state violate the Privileges and Immunities Clause of the United States Constitution unless there is a substantial reason for the difference in treatment and the discrimination practiced against nonresidents bears a substantial relationship to the state's objective. U.S. Const., art. IV, § 2, cl. 1; *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985).

4. The Residency Requirements prevent Tennessee Fine Wines from obtaining a retail package store license because its members are not Tennessee residents.

5. The Residency Requirements are nearly identical to residency requirements for wineries that the Sixth

Circuit declared unconstitutional under the dormant Commerce Clause in *Jelovsek v. Bredesen*, 545 F.3d 431, 438 (6th Cir. 2008).

6. The Residency Requirements do not advance any legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

7. Tennessee Fine Wines is therefore entitled to judgment, as a matter of law, that the Residency Requirements are unconstitutional under the dormant Commerce Clause and the Privileges and Immunities Clause.

CONCLUSION

For these reasons, Tennessee Fine Wines requests the Court to grant partial summary judgment on Mr. Byrd's complaint declaring the Residency Requirements unconstitutional under the dormant Commerce Clause and the Privileges and Immunities Clause and all other necessary or proper relief.

Respectfully submitted:

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Counsel for Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CLAYTON BYRD, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, **Plaintiff,** ***vs.*** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION *et al.*** **Defendants**	**Case No. 3:16-cv-02738** **Chief Judge Sharp** **Magistrate Judge Frensley**

DECLARATION OF EDWARD COOPER IN SUPPORT OF TENNESSEE FINE WINES & SPIRITS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Edward Cooper, make this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am an adult and have personal knowledge of the matters stated in this declaration.

2. I am the Vice President, Public Affairs, of Retail Services & Systems, Inc. ("Retail Services").

3. Retail Services is assisting Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer &

More ("Tennessee Fine Wines") in its efforts to own and operate one or more retail package stores in Tennessee. My duties include assisting Tennessee Fine Wines in those efforts.

4. Tennessee Fine Wines is a limited liability company created under Tennessee law on November 6, 2015.

5. The members of Tennessee Fine Wines are not Tennessee residents.

6. On July 5, 2016, Tennessee Fine Wine filed an application with the Tennessee Alcoholic Beverage Commission (the "ABC") for a new retail package store to be located at 6622 Charlotte Pike, Suite 104, Nashville, Tennessee 37209 (the "Application").

7. Before filing the Application, I and others acting on behalf of Tennessee Fine Wine met several times with the ABC's staff, including its Executive Director, Clayton Byrd, to discuss the company's plans to apply for a retail package store license.

8. In those meetings, we asked the ABC's staff whether the residency requirements for retail package store licenses set forth in Tenn. Code Ann. § 57-3-204(b)(2)(A) and (3)(A) (the "Residency Requirements") would prevent Tennessee Fine Wines from obtaining a license.

9. The ABC's staff advised us that the ABC did not enforce the Residency Requirements in light of two opinions by the Tennessee Attorney General that the Residency Requirements are unconstitutional under the dormant Commerce Clause. The ABC's staff informed us that the ABC had licensed other non-residents based on those opinions.

10. The ABC's staff recommended that the ABC conditionally approve the Application, subject to Tennessee Fine Wines delivering a certificate of occupancy, completing an inspection by the ABC, acknowledging the ABC's rules and regulations, and paying a license fee.

11. Tennessee Fine Wines was ready, willing, and able to meet these conditions.

12. The ABC was scheduled to vote on the Application at its August 23, 2016 meeting. I and others acting on behalf of Tennessee Fine Wines attended the meeting fully believing that the ABC would conditionally approve the Application notwithstanding the Residency Requirements.

13. With no advance notice, the ABC instead voted to defer action until its September 29, 2016 meeting, on the asserted ground that the ABC needed additional time to consult with the Attorney General regarding the Residency Requirements.

14. Then, again without notice to Tennessee Fine Wines, Mr. Byrd filed this action in Davidson County Chancery Court on September 21, 2016.

15. At its September 29, 2016 meeting, the ABC deferred Tennessee Fine Wine's application indefinitely, pending the resolution of this action.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Edward Cooper
Edward Cooper

/s/ January 20, 2017
Date

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CLAYTON BYRD, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, **Plaintiff,** ***vs.*** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION *et al.*** **Defendants**	**Case No. 3:16-cv-02738** **Chief Judge Sharp** **Magistrate Judge Frensley**

STATEMENT OF FACTS IN SUPPORT OF TENNESSEE FINE WINES & SPIRITS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More ("Tennessee Fine Wines") submits this statement of facts in support of its motion for partial summary judgment pursuant to Local Rule 56.01(b). Tennessee Fine Wines contends there is no genuine issue for trial as to the following facts:

1. The Tennessee Alcoholic Beverage Commission ("ABC") is a Tennessee state agency whose duty is to license the sale and delivery of alcoholic beverages.

(Complaint for Declaratory Judgment, DE # 1-1 ["Compl."], at ¶ 1.)

Response:

2. Plaintiff Clayton Byrd is the ABC's Executive Director. (Compl. at ¶ 1.)

Response:

3. Tennessee Fine Wines is a limited liability company created under Tennessee law on November 6, 2015. (Declaration of Edward Cooper ["Cooper Dec."] at ¶ 4.)

Response:

4. The members of Tennessee Fine Wines are not Tennessee residents. (Cooper Dec. at ¶ 5.)

Response:

5. Tennessee Fine Wines seeks to own and operate one or more retail liquor stores (referred to as "retail package stores") in Tennessee. (Cooper Dec. at ¶ 3.)

Response:

6. On July 5, 2016, Tennessee Fine Wine filed an application with ABC for a new retail package store to be located at 6622 Charlotte Pike, Suite 104, Nashville, Tennessee 37209 (the "Application"). (Cooper Dec. at ¶ 6.)

Response:

7. Before filing the Application, Tennessee Fine Wine's representatives met several times with the ABC's staff, including its Executive Director, Clayton Byrd, to discuss the company's plans to apply for a retail package store license. (Cooper Dec. at ¶ 7.)

Response:

8. Those discussions included whether the Residency Requirements would preclude Tennessee Fine Wines from obtaining a license. (Cooper Dec. at ¶ 8.)

Response:

9. The ABC's staff advised Tennessee Fine Wine's representatives that the ABC did not enforce the Residency Requirements in light of two opinions by the Tennessee Attorney General that the Residency Requirements are unconstitutional under the dormant Commerce Clause. (Cooper Dec. at ¶ 9.)

Response:

10. The ABC's staff stated that the ABC had licensed other non-residents based on those opinions. (Cooper Dec. at ¶ 9.)

Response:

11. The ABC's staff recommended that the ABC conditionally approve the Application, subject to Tennessee Fine Wines delivering a certificate of occupancy, completing an inspection by the ABC, acknowledging the ABC's rules and regulations, and paying a license fee. (Cooper Dec. at ¶ 10.)

Response:

12. The ABC was scheduled to vote on the Application at its August 23, 2016, meeting; however, the ABC voted to defer action until its September 29, 2016 meeting, on the asserted ground that the ABC needed additional time to consult with the Attorney General regarding the Residency Requirements. (Compl. at ¶ 15; Cooper Dec. at ¶ 13.)

Response:

13. Mr. Byrd filed this action in the Chancery Court for Davidson County, Tennessee on September 21, 2016 (*See* Compl. at p. 1).

Response:

14. At its September 29, 2016 meeting the ABC deferred Tennessee Fine Wine's application indefinitely, pending the resolution of this action. (Cooper Dec. at ¶ 15.)

Response:

Respectfully submitted:

BONE MCALLESTER NORTON PLLC
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/s/ J. Alex Little (TN BPR # 029858)
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Counsel for Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, **Plaintiff,** **v.** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE AND SPIRITS, TOTAL WINE SPIRITS BEER & MORE,** **Defendants.**	**Case No. 3:16-cv-02738** **CHIEF JUDGE SHARP** **MAGISTRATE JUDGE FRENSLEY**

MOTION FOR PRELIMINARY INJUNCTION

Defendant, Affluere Investments, Inc. doing business as Kimbrough Fine Wine & Spirits ("Kimbrough"), by and through counsel, and pursuant to Federal Rule of Civil Procedure 65, moves this Court for a preliminary injunction enjoining Plaintiff, Clayton Byrd in his official capacity as the Executive Director of the Tennessee Alcoholic Beverage Commission (the "Commission"), or other persons in active concert or participation with the Commission under Federal Rule of Civil Procedure 65(d)(2) from enforcing the unconstitutional residency requirements

set forth in Tennessee Code Annotated section 57-3-204(b)(2)(A) against Kimbrough.

In support of this motion, as set forth in more detail in the Memorandum of Law and the Affidavit of Douglas W. Ketchum dated January 27, 2017 and the Affidavit of Bill Dunn dated January 26, 2017, attached to this motion as Exhibits 1 and 2 respectively, Kimbrough states as follows:

1. Affluere Investments, Inc. doing business as Kimbrough Fine Wine & Spirits ("Kimbrough") is owned by Douglas W. Ketchum and his wife, Mary E. Ketchum.
2. Kimbrough entered into a letter of intent agreement (the "Agreement") to purchase from the seller, Roy Patterson, the business known as Kimbrough Towers Fine Wine located at 1483 Union Avenue, Memphis, Tennessee 38104-3726.
3. At the time of execution of the agreement, Mr. and Mrs. Ketchum were residents of the State of Utah. Their family includes a thirty-two-year-old daughter who suffers from cerebral palsy, quadriplegia, and requires twenty-four hour care.
4. The Ketchums intended to operate Kimbrough as a retail package store to meet their family's needs, including financial needs to provide for the care required for their daughter.
5. At the time of execution of the agreement, Mr. Ketchum was advised that the Tennessee Attorney General had issued two (2) official opinions that the residency requirements of Tennessee Code Annotated section 57-3-204(b)(2)(A) were unconstitutional. Mr. Ketchum was further advised that because of these

Attorney General Opinions, the Tennessee Alcoholic Beverage Commission had issued to other persons or entities who did not satisfy the residency requirements, retail liquor license

6. With this assurance, Mr. Ketchum terminated his employment in Utah, and the Ketchum family relocated to Shelby County, Tennessee in June of 2016.

7. The Ketchums submitted their application to the Commission in May of 2016, and they were advised that the Commission would consider their application at its July 2016 meeting. For reasons unknown, the application was not on the Commission's agenda for its July 2016 meeting. The Ketchums were then told that the application would be considered at the Commission's August 2016 meeting. At that meeting, the Commission deferred consideration of Kimbrough's application to its September 2016 meeting. Prior to its September meeting, the Commission filed this action. Kimbrough's application remains pending; however, the Commission refuses to take action on that application.

8. In its Complaint, the Commission admits that the only basis it possesses for denying Kimbrough's application is the fact that Kimbrough, because of its ownership by the Ketchums, does not satisfy the residency requirements of Tennessee Code Annotated section 57-3-204(b)(2)(A) previously declared unconstitutional by the Tennessee Attorney General. Mr. and Mrs. Ketchum were residents of the State of Utah until June of 2016.

9. Since moving to Tennessee, Mr. Ketchum has not been able to acquire full-time employment, and he does not have any health benefits. The delay in taking action by the Commission and specifically, the inability of Kimbrough as a retail package store, is causing a hardship on the Ketchum family and affects the ability to provide the best care for their daughter.

10. Recently, Mr. Ketchum was advised by the seller that if the Commission does not act on Kimbrough's application in the very near future, the seller intends to terminate the Agreement and commence marketing the business to others.

A preliminary injunction should be granted because Kimbrough has demonstrated a likelihood of success on the merits; irreparable harm will befall Kimbrough if the Commission is not enjoined; the irreparable harm to Kimbrough outweighs the harm to the Commission; and it is in the public interest to grant an injunction.

For the above-stated reasons, this Court should grant Kimbrough's motion and enter a preliminary injunction enjoining Plaintiff Clayton Byrd in his official capacity as the Executive Director of the Tennessee Alcoholic Beverage Commission (the "Commission"), or other persons in active concert or participation with the Commission under Federal Rule of Civil Procedure 65(d)(2) from enforcing the unconstitutional residency requirements set forth in Tennessee Code Annotated section 57-3-204(b)(2)(A) against Kimbrough.

Dated: January 30, 2017

Respectfully submitted,

/s/ Keith C. Dennen

Keith C. Dennen
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Attorneys for Defendant, Affluere Investments, Inc. d/b/a Kimbrough Fine Wine and Spirits

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,

Plaintiff,

v.

Case No. 3:16-cv-02738

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE And SPIRITS, TOTAL WINE SPIRITS BEER & MORE,

Defendants.

DECLARATION OF DOUGLAS W. KETCHUM

STATE OF TENNESSEE)
)
COUNTY OF SHELBY)

COMES NOW Douglas W. Ketchum, and after being first duly sworn, states as follows:

1. I, Douglas W. Ketchum, have personal knowledge of the facts set forth in this Declaration.
2. I am the co-owner of Affluere Investments, Inc. doing business as Kimbrough Fine Wine & Spirits ("Kimbrough") with my wife, Mary E. Ketchum. Kimbrough is a Tennessee corporation with its principal place of business located in Cordova, Shelby County, Tennessee.

3. In April of 2016, Kimbrough entered into a letter of intent ("Agreement") to purchase from Roy Patterson (the "Seller"), the business known as Kimbrough Towers Fine Wine, located at 1483 Union Avenue, Memphis, Tennessee 38104-3726 ("Business").

4. At the time of execution of the Agreement, my wife and I were residents of the State of Utah. Our family includes our thirty-two-year-old daughter who suffers from cerebral palsy, quadriplegia, and requires twenty-four hour care.

5. I was advised that the Tennessee Attorney General had issued two (2) official opinions that the residency requirements of Tennessee Code Annotated section 57-3-204(b)(2)(A) were unconstitutional. I was further advised that because of these Attorney General Opinions, the Tennessee Alcoholic Beverage Commission ("Commission") had issued to other non-residents, and would issue to Kimbrough, a license to sell retail liquor even though Kimbrough did not satisfy those requirements.

6. Based on this information, we submitted an application for a retail liquor license to the Commission's office in Memphis. I was advised that the application was in order and would be placed on the Commission's agenda for its next meeting. At the meeting in Memphis, I was asked my state of residence and no objection was raised.

7. In anticipation of acquiring the Business, I transferred my retirement funds into a separate account to utilize as a down payment for purchase of the Business and secured a commitment for

financing through Wells Fargo Bank. I am subject to continued maintenance charges with respect to the retirement funds and my loan commitment is subject to expiration.

8. I then terminated my employment in Utah, and my family and I move to Shelby County, Tennessee in July of 2016. We have been citizens and residents of Tennessee since that date.

9. Following submission of the application, I was advised that the Commission would consider the application at its July 2016 meeting. Because the local office failed to timely submit our application to Nashville for review, the application was not on the Commission's agenda for that meeting. I was then told that the application would be considered at the Commission's August 2016 meeting. At that meeting, the Commission deferred consideration of Kimbrough's application to its September 2016 meeting. Prior to its September meeting, the Commission filed this action. Kimbrough's application remains pending; however, the Commission refuses to take action on that application.

10. In its Complaint, the Commission admits that the only basis it possesses for denying Kimbrough's application is the fact that Kimbrough does not satisfy the residency requirements of Tennessee Code Annotated section 57-3-204(b)(2)(A) previously declared unconstitutional by the Tennessee Attorney General.

11. Since moving to Tennessee, I have not been able to acquire full-time employment, and I do not have any health benefits. The delay in taking action by

the Commission and specifically, the inability to operate Kimbrough as a retail package store, is causing a hardship on my family and affects the ability to provide the best care for our daughter.

12. Recently, I was advised by the Seller that if the Commission does not act on Kimbrough's application in the very near future, the Seller intends to terminate the Agreement and commence marketing the Business to others.

13. If that occurs, then my family and I will suffer irreparable harm because of the unique nature of the Business and its location, which I would never be able to duplicate.

FURTHER AFFIANT SAYETH NOT.

/s/ Douglas W. Ketchum
Douglas W. Ketchum

SWORN TO AND SUBSCRIBED before me this __ day of January, 2017.

Notary Public

My Commission Expires:

_____

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,

Plaintiff,

v.

Case No. 3:16-cv-02738

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE And SPIRITS, TOTAL WINE SPIRITS BEER & MORE,

Defendants.

AFFIDAVIT OF BILL DUNN

STATE OF TENNESSEE)
)
COUNTY OF SHELBY)

COMES NOW Bill Dunn, and after being first duly sworn, states as follows:

1. I, Bill Dunn, have personal knowledge of the facts set forth in this Affidavit.
2. I am a Principal with Acquisition Finders, Inc., a corporation in good standing in the State of Tennessee and represent Roy Patterson ("Seller") in the sale of Kimbrough Towers Fine Wine located at 1483 Union Avenue, Memphis, Tennessee 38104-3726 ("Business") to Affluere

Investments, Inc. a Tennessee corporation, which is wholly owned by Doug Ketchum ("Buyer").

3. I have personal knowledge of an executed letter of intent between Buyer and Seller with respect to Buyer's purchase of the Business from Seller which letter provides for a closing date of June 29, 2016.

4. The Seller, in its discretion, extended the closing date indefinitely to enable Buyer to obtain its state license with the Tennessee Alcoholic Beverage Commission ("ABC").

5. I am aware that the ABC has delayed issuance of the license to Buyer as a result of threatened litigation from the Tennessee Wine and Spirits Retailers Association.

6. I am also aware that Buyer has relocated to Memphis, Tennessee from the State of Utah and terminated full-time employment in contemplation of closing on the purchase of the Business.

7. Because Seller is not obligated to extend the Letter of Intent, Seller has advised me that unless this matter is resolved in the very near future, Seller will request me to re-market the Business and solicit other potential purchasers of the Business.

FURTHER AFFIANT SAYETH NOT.

/s/ Bill Dunn
Bill Dunn

SWORN TO AND SUBSCRIBED before me this 26th day of January, 2017.

/s/ Michael J. Evangelisti

Notary Public

My Commission Expires:

_____

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; KIMBROUGH FINE WINE & SPIRITS; and TOTAL WINE SPIRITS BEER & MORE, **Plaintiffs,** **v.** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,** **Defendant.**	**Case No. 3:16-cv-02738** **Judge Sharp** **Magistrate Judge Frensley**

PLAINTIFF CLAYTON BYRD'S RESPONSE TO TENNESSEE FINE WINE AND SPIRITS, LLC ("TOTAL WINE")'S STATEMENT OF FACTS IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Clayton Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission ("Commission"), through counsel, the Tennessee Attorney General, hereby submits the following responses to Tennessee Fine

Wine and Spirits, LLC ("Total Wine")'s facts in support of its motion for partial summary judgment as follows:

1. The Tennessee Alcoholic Beverage Commission ("ABC") is a Tennessee state agency whose duty is to license the sale and delivery of alcoholic beverages. (Complaint for Declaratory Judgment, DE # 1-1 ["Compl."], at ¶ 1.)

Response: Not disputed.

2. Plaintiff Clayton Byrd is the ABC's Executive Director. (Compl. at ¶ 1.)

Response: Not disputed.

3. Tennessee Fine Wines is a limited lability company created under Tennessee law on November 6, 2015. (Declaration of Edward Cooper ["Cooper Dec."] at ¶ 4.)

Response: Not disputed.

4. The members of Tennessee Fine Wines are not Tennessee residents. (Cooper Dec. at ¶ 5.)

Response: Not disputed.

5. Tennessee Fine Wines seeks to own and operate one or more retail liquor stores (referred to as "retail package stores") in Tennessee. (Cooper Dec. at ¶ 3.)

Response: Not disputed.

6. On July 5, 2016, Tennessee Fine Wine filed an application with ABC for a new retail package store to be located at 6622 Charlotte Pike, Suite 104, Nashville, Tennessee 37209 (the "Application"). (Cooper Dec. at ¶ 6.)

Response: Not disputed but not material to a determination of the constitutionality of the residency requirement.

7. Before filing the Application, Tennessee Fine Wine's representatives met several times with the ABC's staff, including its Executive Director, Clayton Byrd, to discuss the company's plans to apply for a retail package store license. (Cooper Dec. at ¶ 7.)

Response: Disputed but not material to a determination of the constitutionality of the residency requirement. Dir. Byrd did not meet with representatives of Tennessee Fine Wine (Total Wine) prior to the submission of its application on July 5, 2016. (Aff. Byrd ¶ 5.)

8. Those discussions included whether the Residency Requirements would preclude Tennessee Fine Wines from obtaining a license. (Cooper Dec. at ¶ 8.)

Response: Disputed but not material to a determination of the constitutionality of the residency requirement. Dir. Byrd did not meet with representatives of Tennessee Fine Wine (Total Wine) prior to the submission of its application on July 5, 2016. (Aff. Byrd ¶ 5.)

9. The ABC's staff advised Tennessee Fine Wine's representatives that the ABC did not enforce the Residency Requirements in light of two opinions by the Tennessee Attorney General that the Residency Requirements are unconstitutional under the dormant Commerce Clause. (Cooper Dec. at ¶ 9.)

Response: Disputed only to the extent that Dir. Byrd was not a party to those discussions. (Aff. Byrd ¶¶ 5, 7.)

10. The ABC's staff stated that the ABC had licensed other non-residents based on those opinions. (Cooper Dec. at ¶ 9.)

Response: Not disputed but not material to a determination of the constitutionality of the residency requirement.

11. The ABC's staff recommended that the ABC conditionally approve the Application, subject to Tennessee Fine Wines delivering a certificate of occupancy, completing an inspection by the ABC, acknowledging the ABC's rules and regulations, and paying a license fee. (Cooper Dec. at ¶ 10.)

Response: Not disputed.

12. The ABC was scheduled to vote on the Application at its August 23, 2016, meeting; however; the ABC voted to defer action until its September 29, 2016 meeting, on the asserted ground that the ABC needed additional time to consult with the Attorney General regarding the Residency Requirements. (Comp. at ¶ 15; Cooper Dec. at ¶ 13.)

Response: Not disputed.

13. Mr. Byrd filed this action in the Chancery Court for Davidson County, Tennessee on September 21, 2016 (See Compl. at p. 1).

Response: Not disputed.

14. At its September 29, 2016 meeting the ABC deferred Tennessee Fine Wine's application indefinitely, pending the resolution of this action. (Cooper Dec. at ¶ 15.)

Response: Not disputed.

Respectfully submitted,
HERBERT H. SLATERY
III

Attorney General &
Reporter
/s/Linda D. Kirklen
/s/Scott C. Sutherland
Deputy Attorney General
Linda D. Kirklen
Assistant Attorney General
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BPR No. 29935
Counsel for Plaintiff
Clayton Byrd

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; KIMBROUGH FINE WINE & SPIRITS; and TOTAL WINE SPIRITS BEER & MORE,	**Case No. 3:16-cv-02738**
Plaintiffs,	**Judge Sharp**
v.	**Magistrate Judge Frensley**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,	
Defendant.	

AFFIDAVIT OF CLAYTON BYRD

STATE OF TENNESSEE
DAVIDSON COUNTY

After being duly sworn, the affiant, Clayton Byrd, states:

1. I am an adult resident of the State of Tennessee, am competent to provide the testimony herein, and make this statement based on personal knowledge.

2. I serve as the Executive Director of the Tennessee Alcoholic Beverage Association ("TABC").
3. In my capacity as Executive Director of the TABC I initiated the above-styled action by filing a complaint seeking a declaratory judgment regarding the constitutionality of the residency requirements for retail package store licenses set forth in Tenn. Code Ann. § 57-3-204(b)(2)(A) and (3)(A).
4. I have knowledge that Tennessee Fine Wines & Spirits, LLC ("Tennessee Fine Wines") filed an application for a retail package store license with the TABC on July 5, 2016.
5. I did not meet with any representatives of Tennessee Fine Wines prior to the submission of their application on July 5, 2016.
6. The first time I met in person with representatives from Tennessee Fine Wines was in my office on July 11, 2016. TABC Assistant Director Zack Blair was in attendance at that meeting. Before that date, I was not aware Tennessee Fine Wines had applied for a retail package store license.
7. During the July 11, 2016, meeting with Tennessee Fine Wines there was no discussion regarding the residency requirements at issue in the above-styled action.
8. In a subsequent telephone conversation with David Trone of Tennessee Fine Wines on August 18, 2016, Mr. Trone did raise the issue of the residency requirements and threatened

litigation should Tennessee Fine Wines' application be declined by the TABC.

9. In the conversation with Mr. Trone on August 18, 2016, I took no position with respect to the constitutionality of the residency requirements. I did explain the dilemma of the TABC in either enforcing a statute opined to be unconstitutional by the Attorney General or not enforcing the statute and acting beyond the scope of the statute. I indicated my only goal was to act in the best interest of the state and the taxpayers if a challenge or litigation would occur as a result of either option.

10. I believe other TABC staff members at times informed Tennessee Fine Wines that the TABC had not enforced the residency requirements in the past based on two Attorney General Opinions.

Further affiant sayeth not.

/s/
AFFIANT

SWORN TO AND SUBSCRIBED before me on the 10th day of February, 2017.

/s/ Melissa S. Proctor
NOTARY PUBLIC
STATE OF TENNESSEE

Notary's printed name: /s/ Melissa S. Proctor
My commission expires July 2, 2018

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,	
Plaintiff,	
v.	**Case No. 3:16-cv-02738**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION, KIMBROUGH FINE WINE AND SPIRITS, TOTAL WINE SPIRITS BEER & MORE,	**CHIEF JUDGE SHARP** **MAGISTRATE JUDGE FRENSLEY**
Defendants,	
and	
AFFLEURE INVESTMENTS, INC.) D/B/A KIMBROUGH FINE WINE AND SPIRITS,	

Counter-Plaintiff,	)
v.	)
	)
CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,	)
	)
Counter-Defendant.	)

COUNTERCLAIM FOR INJUNCTIVE RELIEF

INTRODUCTION

Defendant/Counter-Plaintiff, Affluere Investments, Inc. doing business as Kimbrough Fine Wine & Spirits ("Kimbrough"), pursuant to Federal Rules of Civil Procedure 13 and 65, files this Counterclaim for Injunctive Relief against Plaintiff/Counter-Defendant, Clayton Byrd in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission ("the Commission"). In support of this Counterlcaim, Kimbrough states as follows:

JURISDICTION AND VENUE

1. This case was removed pursuant to 28 U.S.C. § 1446(b) based on this Court's federal question jurisdiction under 28 U.S.C. § 1331.

2. Venue in this Court is proper.

PARTIES

3. Plaintiff/Counter-Defendant Clayton Byrd is the Executive Director of the Tennessee Alcoholic

Beverage Commission ("Commission"). Director Byrd is "solely responsible to the Commission for the administration and enforcement of this chapter and shall be responsible for the performance of all duties and functions delegated by the commission." TENN. CODE ANN. § 57-1-105. The Commission has a duty to "[i]ssue all licenses in respect to . . . sale, and delivery of alcoholic beverages . . . ." TENN. CODE ANN. § 57-3-104(c)(1).

4. Kimbrough is a Tennessee corporation. Kimbrough filed its articles of incorporation with the Office of the Secretary of State for the State of Tennessee on April 21, 2016, and it has continuously maintained its status as a Tennessee corporation since its incorporation. Kimbrough's principal offices are located at 7716 Chapel Creek Parkway North, Cordova, Tennessee 38016.

5. Kimbrough's sole shareholders, executive officers and director are: Douglas W. Ketchum and his wife, Mary E. Ketchum. Since June of 2016, the Ketchums have been citizens and residents of the State of Tennessee. Prior to that date, the Ketchums were citizens and residents of the State of Utah.

6. This case involves a retail liquor store located at 1483 Union Avenue, Memphis, Tennessee (the "Store") That liquor store is located on Union Avenue in the heart of Memphis Midtown area and directly adjacent to the historic Central Gardens area. The Central Gardens Area is one of Memphis most affluent areas. Consequently, it is a unique location for the retail sale of fine wines and liquors.

7. Kimbrough has entered into a letter of intent agreement (the "Agreement") to purchase the Store

from its present owner. Kimbrough plans to continue the operation of the Store as a retail liquor store. Consistent with that intent, Kimbrough has obtained loan commitments from third parties and is ready and willing to close the sale upon issuance of a retail liquor store license.

FACTUAL ALLEGATIONS

8. The Commission has a duty to "[i]ssue all licenses in respect to . . . sale, and delivery of alcoholic beverages . . . ." TENN. CODE ANN. § 57-3-104(c)(1).

9. Kimbrough submitted an application for a retail package store license to the Commission in June of 2016. The Commission, at its August 23, 2016 meeting, deferred consideration of Kimbrough's application until its September 29, 2016 meeting. Prior to its September 29, 2016 meeting, the Commission filed this action for declaratory judgment. In addition, the Commission deferred consideration of Kimbrough's application indefinitely during the pendency of that action.

10. As stated in its Complaint for Declaratory Judgment, the Commission has found no grounds for denying Kimbrough's application other than the fact that Kimbrough's owners have not been residents of the State of Tennessee for at least two (2) years as required by the residency requirements contained in Tennessee Code Annotated section 57-3-204(b)(2)(A).

11. In fact, in reliance on two Tennessee Attorney's General Opinions that specifically address the residency requirements in Tennessee Code Annotated section 57-3-204(b)(2)(A) and finding no other grounds for denying Kimbrough's license application, the Commission's staff recommends

approval of Kimbrough's license application but for the conflicting statutory residency requirement. Tenn. Op. Att'y Gen. 12-59; Tenn. Op. Att'y Gen. 14-83.

12. In those two opinions, Opinion 12-59 and Opinion 14-83, the Attorney General of the State of Tennessee opined that the provisions of Tennessee Code Annotated section 57-3-204(b) are unconstitutional. In those opinions, the Attorney General relied upon the decision of the United States Court of Appeals for the Sixth Circuit in *Jelvosek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008), *cert. denied*, 558 U.S. 874, 130 S.Ct. 199, 175 L.Ed.2d 127 (2009), in which that court declared the similar Two Year/Ten Year Residency Requirement contained in Tennessee's Grape and Wine Law to be unconstitutional.

13. Since 2012, the Commission has routinely granted retail liquor licenses to persons and entities that did not satisfy the residency requirements contained in Tennessee Code Annotated section 57-3-204(b)(2)(A) based on the two Tennessee Attorney General Opinions.

14. In response to the application filed by Kimbrough, the Tennessee Wine and Spirits Retailers Association ("TWRA"), a trade organization whose members include retail liquor store owners, threatened to file a lawsuit against the Commission if the Commission granted Kimbrough's application and the application of another applicant—Defendant Total Wine Spirits Been & More.

15. Upon information and belief, the threat of a lawsuit by TWRA is the sole reason that the Commission refuses to consider and has failed to grant Kimbrough's application.

16. Based on the facts stated herein, Kimbrough is likely to prevail on the merits of this case at a final hearing.

17. Mr. Ketchum terminated his employment in Utah, and he moved to Tennessee based upon his intent to operate the Store. To date, Mr. Ketchum has not been able to obtain comparable full-time employment.

18. The Commission's failure to grant Kimbrough a license has caused, and will continue to cause, a hardship on the Ketchums, specifically in regards to providing the care required for their child with special needs.

19. The seller of the Store has extended the time for Kimbrough to purchase the Store because of the Commission's actions.

20. Recently, the seller has indicated that if the license from the Commission is not issued in the very near future, the seller intends to commence marketing the Store to other potential buyers.

21. Unless this Court enjoins the Commission from enforcing the unconstitutional residency requirements in Tennessee Code Annotated section 57-3-204(b)(2)(A), Kimbrough will suffer immediate and irreparable harm, including, but not limited to, the ability to the loss of the opportunity to purchase the Store.

22. If a preliminary injunction is issued, the Commission will suffer no irreparable harm as the Commission has previously and routinely granted licenses to persons and entities who did not meet the residency requirements in Tennessee Code Annotated section 57-3-204(b)(2)(A).

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, AFFLUERE INVESTMENTS, INC. D/B/A KIMBROUGH FINE WINE AND SPIRITS PRAYS that:

1. Upon hearing in this cause, this Court issue a Preliminary and a Permanent Injunction enjoining the Plaintiff/Counter-Defendant, Clayton Byrd in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission from enforcing the residency requirements set forth in Tennessee Code Annotated section 57-3-204(b)(2)(A);

2. That any injunction issued be issued without the necessity for posting of bond or other security; and

3. That this Court grant any other further relief to which Kimbrough may be entitled.

Dated: January 30, 2017.

Respectfully submitted,

/s/Keith C. Dennen
Keith C. Dennen, #012618
FARRIS BOBANGO, PLC
Bank of America Building
414 Union Street, Suite 1105
Nashville, Tennessee 37219
Telephone: (615) 726-1200
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Attorneys for Defendant/Counter-Plaintiff, Affluere Investments, Inc. d/b/a Kimbrough Fine Wine and Spirits

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; KIMBROUGH FINE WINE & SPIRITS; and TOTAL WINE SPIRITS BEER & MORE	**Case No. 3:16-cv-02738**
	Judge Sharp
Plaintiffs,	**Magistrate Judy Frensley**
v.	
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,	
Defendant.	

AMENDED ANSWER OF TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION

The Defendant Tennessee Wine and Spirits Retailers Association (the "Association") answers the Complaint for Declaratory Judgment as follows:

1. Admitted.

2. Admitted.

3. Denied. The Association denies that "Kimbrough Fine Wine & Spirits" is a legal entity. The Association

avers that Affluere Investments, Inc., is a Tennessee corporation with its principal offices in West Valley City, Utah. Affluere Investments, Inc., made application for a retail package store license under which the corporation claims that it will do business as Kimbrough Fine Wine & Spirits through the transfer of ownership of an existing package store located at the address referenced in Paragraph 3 of the Complaint. In its retail package store license application, Affluere Investments, Inc., identified Doug Ketchum and Mary Ketchum as its members. Upon information and belief, neither Doug Ketchum nor Mary Ketchum have resided in Tennessee for two years preceding the date of the application for a retail package store license filed by Affluere Investments, Inc.

4. Denied. The Association denies that "Total Wine Spirits Beer & More" is a legal entity. The Association avers that Tennessee Fine Wines & Spirits, LLC, is a Tennessee corporation with its principal offices in Bethesda, Maryland. Tennessee Fine Wines & Spirits, LLC, made application for a retail package store license under which the corporation claims that it will do business as Total Wine Spirits Beer & More. In its retail package store license application, Tennessee Fine Wines & Spirits, LLC, identified David J. Trone, Robert L. Trone, and five Trusts as its members. Upon information and belief, none of the members of Tennessee Fine Wine & Spirits, LLC, have resided in Tennessee for two years preceding the date of the application for a retail package store license filed by Tennessee Fine Wine & Spirits, LLC.

5. Jurisdiction is not disputed.

6. Venue is not disputed.

7. Admitted.

8. Admitted.

9. The Association admits that the quoted language from Tenn. Code Ann. § 57-3-204(b)(4) became law in 2014 and provides some legislative explanation of the State's reasoning for its oversight, control and accountability measures for individuals involved in the ownership, management and control of premises used for the retail sale of liquor, spirits and high alcohol content beer.

10. Admitted.

11. The Association lacks sufficient information to admit or deny the allegations of Paragraph 11 of the Complaint.

12. The Association admits that Affluere Investments, Inc., has submitted an application as alleged in Paragraph 12 of the Complaint and admits, upon information and belief, that the principals of Affluere Investments, Inc., do not satisfy the statutory residency requirements in Tenn. Code Ann. § 57-3-204(b)(2)(A).

13. The Association admits that Tennessee Fine Wine & Spirits, LLC, has submitted an application as alleged in Paragraph 13 of the Complaint and admits, upon information and belief, that the principals of Tennessee Fine Wine & Spirits, LLC, do not satisfy the statutory residency requirements in Tenn. Code Ann. § 57-3-204(b)(2)(A).

14. The Association lacks sufficient information to admit or deny the allegations in Paragraph 14 of the Complaint about what the Commission's staff would

recommend. The Association avers that Tenn. Code Ann. § 57-3-210(d) prohibits the Commission "under any condition" from issuing a retail license to any person who, within ten (10) years preceding application for the license, has been engaged in business alone or with others in violation of the liquor laws, rules or regulations of Tennessee or any other state. The Association avers that on the basis of this prohibition, the Commission is required by law to deny the Tennessee Fine Wine & Spirits, LLC, retail package store license application. In addition, the Association avers that Tenn. Code Ann. § 57-3-204(b)(1)(D) prohibits the Commission from issuing a retail package store license to any individual who is not twenty-one years of age or older. The Association further avers that Tenn. Code Ann. § 57-3-204(b)(1)(G) prohibits the Commission from issuing a retail package store license to any individual who intends to carry on the business authorized by the license as the agent or on behalf of another. The Association avers that the Tennessee Fine Wine & Spirits, LLC, retail package store license application shows on its face that the principals of the LLC include five Trusts, through which Trustees will be carrying on the business authorized by the license as agents for the Trust beneficiaries. The Association further avers, on information and belief, that the beneficiary of one of those Trusts is a minor under the age of twenty-one. The Association avers that on the basis of these prohibitions, the Commission's staff is bound to recommend denial of the Tennessee Fine Wine & Spirits, LLC, retail package store license application.

15. Admitted upon information and belief.

16. Admitted.

17. Denied. The Association admits that Kurtis J. Winstead, general counsel for the Association, speculated that litigation was likely whether the Commission granted or denied the Tennessee Fine Wine & Spirits, LLC, retail package store license application. To the extent that the Plaintiff alleges that Winstead's speculation was an assurance or threat of litigation, the allegation is denied.

18. The Association lacks sufficient information to admit or deny the allegations of Paragraph 18 of the Complaint.

19. Denied. The Tennessee General Assembly has plenary power over the subject of sale and distribution of alcoholic beverages. *Metro Gov't of Nashville and Davidson County v. Shacklett*, 554 S.W.2d 601, 607 (Tenn. 1977). The Commission, an office of the Executive branch of state government, cannot exercise power belonging to the Legislative branch of government. *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975). Only a Court can declare a statute unconstitutional. *City of Memphis v. Shelby County Election Commission*, 146 S.W.3d 531, 538 (Tenn. 2004). Neither a threat of litigation by a license applicant nor an Attorney General's opinion excuse the Commission and its staff from following state law.

20. Denied.

21. The Association adopts and incorporates by references its responses to Paragraphs 1-20 of the Complaint.

22. The Association lacks sufficient information to admit or deny that such a controversy exists with regard to the Affluere Investments, Inc. The Association denies that such a controversy exists with

regard to Tennessee Fine Wine & Spirits, LLC, because there are other independent grounds upon which the Commission is required by law to deny the Tennessee Fine Wine & Spirits, LLC, retail package store license application, making a judicial decision about the constitutionality of Tenn. Code Ann. § 57-3-204(b)(2)(A) unnecessary.

23. The Association lacks sufficient information to admit or deny the allegations of Paragraph 23 of the Complaint.

24. Denied.

25. With respect to the Affluere Investments, Inc., the Association lacks sufficient information to admit or deny the allegations of Paragraph 25 of the Complaint. With respect to Tennessee Fine Wine & Spirits, LLC, the Association avers that there are independent statutory grounds that require denial of the application for a retail package store license for reasons that would not entail litigation over the constitutional issue posed by the Plaintiff in this action, and for that reason the allegations of Paragraph 25 of the Complaint are denied.

26. Undisputed.

27. Denied. The Association avers that as to Tennessee Fine Wine & Spirits, LLC, there are independent statutory grounds that require the Commission to deny the application for a retail package store license regardless of the disposition of the constitutional issue posed by the Plaintiff in this action.

28. All allegations not admitted or otherwise explained are denied.

Additional Defenses:

1. The Plaintiff has failed to join the proper parties.

2. The parties are not properly aligned and should be realigned. The interests of the Plaintiff are aligned with the interests of Affluere Investments, Inc., and Tennessee Fine Wine & Spirits, LLC. Affluere Investments, Inc., and Tennessee Fine Wine & Spirits, LLC, should be realigned as Plaintiffs.

3. The Complaint fails to state a claim upon which relief can be granted as to Tennessee Fine Wine & Spirits, LLC, because there are independent statutory grounds that require denial of the retail package store license application of Tennessee Fine Wine & Spirits, LLC.

4. The Court should abstain from deciding the constitutional issue posed by the Complaint unnecessarily if other grounds exist, besides the statute whose constitutionality is in question, that require denial of the retail package store license applications of the Affluere Investments, Inc., and Tennessee Fine Wine & Spirits, LLC.

5. **One or more of the Plaintiffs lacks standing.**

Respectfully submitted,
/s/ Richard L. Colbert

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; KIMBROUGH FINE WINE & SPIRITS; and TOTAL WINE SPIRITS BEER & MORE	**Case No. 3:16-cv-02738**
Plaintiffs,	**Judge Sharp**
v.	**Magistrate Judge Frensley**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,	
Defendant.	

DEFENDANT'S RESPONSE TO PLAINTIFF TENNESSEE FINE WINE & SPIRITS, LLC'S STATEMENT OF FACTS IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

The Defendant Tennessee Wine and Spirits Retailers Association ("Association") submits the following responses to Plaintiff Tennessee Fine Wine

& Spirits, LLC's ("Total Wine") statement of facts in support of its motion for partial summary judgment [ECF Doc. No. 55-2].

1. The Tennessee Alcoholic Beverage Commission ("ABC") is a Tennessee state agency whose duty is to license the sale and delivery of alcoholic beverages. (Complaint for Declaratory Judgment, DE # 1-1 ["Compl."], at ¶ 1.)

Response: Undisputed.

2. Plaintiff Clayton Byrd is the ABC's Executive Director. (Compl. at ¶ 1.)

Response: Undisputed.

3. Tennessee Fine Wines is a limited liability company created under Tennessee law on November 6, 2015. (Declaration of Edward Cooper ["Cooper Dec."] at ¶ 4.

Response: Undisputed.

4. The members of Tennessee Fine Wines are not Tennessee residents. (Cooper Dec. at ¶ 5.)

Response: Undisputed.

5. Tennessee Fine Wines seeks to own and operate one or more retail liquor stores (referred to as "retail package stores") in Tennessee. (Cooper Dec. at ¶ 3.)

Response: Undisputed.

6. On July 5, 2016, Tennessee Fine Wine filed an application with ABC for a new retail package store to be located at 6622 Charlotte Pike, Suite 104, Nashville, Tennessee 37209 (the "Application"). (Cooper Dec. at ¶ 6.)

Response: Undisputed.

7. Before filing the Application, Tennessee Fine Wine's representatives met several times with the ABC's staff, including its Executive Director, Clayton Byrd, to discuss the company's plans to apply for a retail package store license.

Response: Disputed — Director Byrd did not meet with representatives of Total Wine prior to the submission of Total Wine's application. [ECF Doc. No. 73-1, ¶ 7]. Furthermore, the Association objects to this statement because it is not material to determining the constitutionality of Tennessee's residency requirement.

8. Those discussions included whether the Residency Requirements would preclude Tennessee Fine Wines from obtaining a license. (Cooper Dec. at ¶ 8.)

Response: Disputed — Director Byrd did not meet with representatives of Total Wine prior to the submission of Total Wine's application. [ECF Doc. No. 73-1, ¶ 8]. Furthermore, the Association objects to this statement because it is not material to determining the constitutionality of Tennessee's residency requirement.

9. The ABC's staff advised Tennessee Fine Wine's representatives that the ABC did not enforce the Residency Requirements in light of two opinions by the Tennessee Attorney General that the Residency Requirements are unconstitutional under the dormant Commerce Clause. (Cooper Dec. at ¶ 9.)

Response: Disputed to the extent that Director Byrd was not a party to these discussions [ECF Doc. No. 73-1, ¶ 9]. Furthermore, the Association

objects to this statement because it is not material to determining the constitutionality of Tennessee's residency requirement.

10. The ABC's staff stated that the ABC had licensed other non-residents based on those opinions. (Cooper Dec. at ¶ 9.)

Response: Undisputed for purposes of summary judgment only. The Association objects to this statement because it is not material to determining the constitutionality of Tennessee's residency requirement.

11. The ABC's staff recommended that the ABC conditionally approve the Application, subject to Tennessee Fine Wines delivering a certificate of occupancy, completing an inspection by the ABC, acknowledging the ABC's rules and regulations, and paying a license fee. (Cooper Dec. at ¶ 10.)

Response: Undisputed for purposes of summary judgment only. The Association objects to this statement because it is not material to determining the constitutionality of Tennessee's residency requirement.

12. The ABC was scheduled to vote on the Application at its August 23, 2016, meeting; however, the ABC voted to defer action until its September 29, 2016 meeting, on the asserted ground that the ABC needed additional time to consult with the Attorney General regarding the Residency Requirements. (Compl. at ¶ 15; Cooper Dec. at ¶ 13.)

Response: Undisputed.

13. Mr. Byrd filed this action in the Chancery Court for Davidson County, Tennessee on September 21, 2016 (*See* Compl. at p. 1).

Response: Undisputed.

14. At its September 29, 2016 meeting the ABC deferred Tennessee Fine Wine's application indefinitely, pending the resolution of this action. (Cooper Dec. at ¶ 15.)

Response: Undisputed.

Respectfully submitted,

/s/ Richard L. Colbert
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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CLAYTON BYRD, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, **Plaintiff,** ***vs.*** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION *et al.*** **Defendants**	**Case No. 3:16-cv-02738** **Chief Judge Sharp** **Magistrate Judge Frensley**

NOTICE OF FILING

Tennessee Fine Wines & Spirits, LLC ("Tennessee Fine Wines") hereby gives notice of the filing of the declaration of W. Justin Adams attached hereto as **Exhibit 1**. Tennessee Fine Wines is filing this declaration in further support of paragraphs 9 and 10 of its statement of facts regarding its motion for partial summary judgment. (*See* Dkt. #55-2 at ¶¶ 9–10.)

Respectfully submitted:

BONE MCALLESTER NORTON PLLC
/s/ Edward M. Yarbrough (TN BPR # 004097)
/s/ J. Alex Little (TN BPR # 029858)
/s/ W. Justin Adams (TN BPR # 022433)
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Counsel for Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, **Plaintiff,** ***vs.*** **TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION *et al.*** **Defendants**	**Case No. 3:16-cv-02738** **Chief Judge Sharp** **Magistrate Judge Frensley**

DECLARATION OF W. JUSTIN ADAMS IN SUPPORT OF TENNESSEE FINE WINES & SPIRITS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I, W. Justin Adams, make this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am an adult and have personal knowledge of the matters stated in this declaration.

2. I am an attorney with the law firm of Bone McAllester Norton PLLC in Nashville, Tennessee. I am one of the counsel of record for Tennessee Fine Wines & Spirits, LLC dba Total Wine Spirits Beer & More ("Tennessee Fine Wines") in this case.

3. On March 10, 2017, I sent a public records request to the Tennessee Alcoholic Beverage Commission by a letter to the Commission's legal counsel, Joshua Stepp. Request No. 5 in my letter sought "[a]ny records of the Tennessee Alcoholic Beverage Commission granting a retail package store license application submitted by an applicant who did not comply with the Residency Requirements [Tenn. Code Ann. § 57-3-04(b)(2)(A) or Tenn. Code Ann. § 57-3-204(b)(3)(A)]" from June 6, 2012, to the present. Request No. 6 in my letter sought "[a]ny records of the Tennessee Alcoholic Beverage Commission denying a retail package store license application on the ground that the applicant did not comply with the Residency Requirements" from June 6, 2012, to the present.

4. On March 16, 2017, I received a letter from Mr. Stepp in response to my request, a copy of which is attached as **Exhibit 1**. Regarding Items 5 and 6 of my request, Mr. Stepp stated as follows:

> Please be advised, however, that shortly after the issuance of the 2012 Attorney General Opinion [Tenn. Op. Att'y Gen. No. 12-59 (June 6, 2012)], the Commission did not consider the Residency Requirements in determining whether to grant or deny an application for a license. Thus, the Commission does not have any records responsive to Request Nos. 5 and 6, because the Commission made no determination as to whether an applicant complied with the Residency Requirements in determining whether to grant or deny a license, and the Residency Requirements were not considered in granting or denying an application.

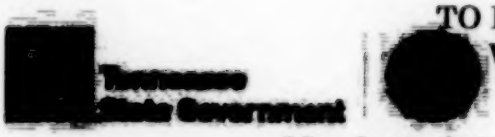
Exhibit 2 at pp. 2–3.

5. It therefore appears that the Commission deviated from its previous policy of not considering the Residency Requirements when the Commission deferred action on Tennessee Fine Wines' application for a retail package store license on August 23 and September 29, 2016. This change in policy occurred without any prior notice.

I declare under penalty of perjury that the foregoing is true and correct.

/s/W. Justin Adams
W. Justin Adams
4/12/17
Date

EXHIBIT 1
TO DECLARATION OF
W. JUSTIN ADAMS



March 16, 2017

W. Justin Adams
Bone McAllester Norton PLLC
Nashville City Center, Suite 1600
511 Union Street
Nashville, TN 37219
RE: Public Records Request

Dear Mr. Adams:

On March 10, 2017, the Tennessee Alcoholic Beverage Commission received your letter clarifying your request for copies of the following records for the time period of June 6, 2012, to the present, pursuant to the Tennessee Public Records Act:

1. Any e-mails, letters, reports, memoranda, or other documents referring to the opinions of the Tennessee Attorney General expressed in Tenn. Op. Att'y Gen. No. 12-59 (June 6, 2012) or Tenn. Op. Att'y Gen. No. 14-83 (Sept. 12, 2014).

2. Any e-mails, letters, reports, memoranda, or other documents referring to the opinion of the United States Court of Appeals for the Sixth Circuit in *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008).

3. Any e-mails, letters, reports, memoranda, or other documents referring to the constitutionality or enforceability of Tenn. Code Ann. § 57-3-204(b)(2)(A) or Tenn. Code Ann. § 57-3-204(b)(3)(A) (the "Residency Requirements").

4. Any e-mails, letters, reports, memoranda, or other documents referring to the Residency Requirements' applicability to or effect on a particular retail package store license application.

5. Any records of the Tennessee Alcoholic Beverage Commission granting a retail package store license application submitted by an applicant who did not comply with the Residency Requirements.

6. Any records of the Tennessee Alcoholic Beverage Commission denying a retail package store license application on the ground that the applicant did not comply with the Residency Requirements.

Tenn. Code Ann. § 10-7-503(a) provides the following:

(2)(B) The custodian of a public record or the custodian's designee shall promptly make available for inspection any public record not specifically exempt from disclosure. In the event it is not practicable for the records to be promptly available for inspection, the custodian shall within seven (7) business days:

(i) Make such information available to the requestor;

(ii) Deny the request in writing or by completing a records request response form developed by the office of open records counsel. The response shall include the basis for the denial; or

(iii) *Furnish the requestor a completed records request response form developed by the office of open records counsel stating the time reasonably necessary to produce such record or information.* (emphasis added.)

The Commission is in the process of searching for, retrieving, reviewing, and redacting, if necessary, all records responsive to your request. Please be advised, however, that shortly after the issuance of the 2012 Attorney General Opinion, the Commission did not consider the Residency Requirements in determining whether to grant or deny an application for a license. Thus, the Commission does not have any records responsive to Request Nos. 5 and 6, because the Commission made no determination as to whether an applicant complied with the Residency Requirements in determining whether to grant or deny a license, and the Residency Requirements were not considered in granting or denying an application.

The only records that the Commission may have are the records of applicants with an out-of-state address within 2 years prior to application who were granted a retail package store license. However, in order to provide copies of these records, the Commission will have to physically search through approximately 600+ files to determine first if an applicant was granted a license and then if the applicant has an out-of-state address within 2 years prior to application. Approximately half of these files are active and the Commission estimates that it will take between 10-30 minutes per file to retrieve the files, make this determination, and make copies of any records. The remaining files are closed and in storage and the Commission estimates that it will take significantly longer to retrieve those files and then search and determine if they have any responsive records. In total, the Commission estimates that it will take between 205 and 470 hours to produce copies of the records of applicants with an out-of-state address who

were granted a retail package store license since June 6, 2012.

Please advise as to whether you still want the Commission to produce copies of these records. If so, given the breadth and scope of your request, the Commission will need to produce these records in installments. The Commission estimates that the first installment will be available March 31, 2017. We will provide you an estimate of the cost for producing that first installment prior to that date.

Sincerely,

s/Joshua F. Stepp

Joshua Stepp
Commission Counsel
Tennessee Alcoholic Beverage Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, *et al.*,	
Plaintiffs,	**Case No. 3:16-cv-02738**
V.	**Judge Sharp**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,	
Defendant.	

ORDER

For the reasons set forth in the Memorandum filed contemporaneously herewith, Plaintiff Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) Motion for Partial Summary Judgment, (Docket No. 55), is hereby GRANTED. The Court declares the residency requirements under Tenn. Code Ann. § 57-3-204 unconstitutional and enjoins their enforcement.

This order shall constitute the judgment in this case pursuant to Fed. R. Civ. P. 58.

It is SO ORDERED.

/s/ Kevin H. Sharp
KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, *et al.*,	)	**Case No. 3:16-cv-02738**
Plaintiffs,	)	**Judge Sharp**
V.	)	
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,	)	
Defendant.	)	

ORDER

Pending before the Court are the following motions: Plaintiff Affluere Investments, Inc.'s (d/b/a/ Kimbrough Fine Wine & Spirits) ("Affluere") Motion for Preliminary Injunction, (Docket No. 63); Plaintiff Clayton Byrd's ("Byrd") Motion for Protective Order, (Docket No. 81); and Plaintiff Byrd's Motion to Dismiss Plaintiff Affluere's Counterclaim for Injunctive Relief, (Docket No. 87).

Because the Court has granted Plaintiff Tennessee Fine Wines and Spirits, LLC's (d/b/a Total Wine Spirits Beer & More) Motion for Partial Summary Judgment, Plaintiff Affluere's Motion for Preliminary Injunction, (Docket No. 63), and Plaintiff Byrd's Motion to Dismiss, (Docket No. 87), are hereby

DENIED AS MOOT. Likewise, the Court hereby DENIES AS MOOT Plaintiff Byrd's Motion for Protective Order, (Docket No. 81).

It is SO ORDERED.

s/ Kevin H. Sharp
KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE